Docket for 02-811

(10)

No. 02-811 Status: ARGUED
Title: Jeff Groh, Petitioner
v.
Joseph R. Ramirez, et al.
Docketed: November 27, 2002
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (99-36138, 00-35955)
Decision Date: March 13, 2002
Rehearing Denied: July 25, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 11 2002	Application (02A307) to extend the time to file a petition for a writ of certiorari from October 23, 2002 to November 22, 2002, submitted to Justice O'Connor.
Oct 11 2002	Application (02A307) granted by Justice O'Connor extending the time to file until November 22, 2002.
Nov 22 2002	Petition for writ of certiorari filed. (Response due December 27, 2002)
Dec 27 2002	Order extending time to file response to petition to and including January 27, 2003.
Jan 27 2003	Brief of respondents Joseph R. Ramirez, et al. in opposition filed.
Feb 11 2003	Reply of petitioner Jeff Groh filed.
Mar 3 2003	Petition GRANTED.
Apr 2 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 19, 2003.
May 19 2003	Brief amicus curiae of United States
May 19 2003	Joint appendix filed.
May 19 2003	Brief of petitioner Jeff Groh filed.
May 19 2003	Brief amicus curiae of Texas, et al. filed.
Jun 11 2003	Extension of time within which to file respondents' brief on the merits to and including July 25, 2003.
Jul 25 2003	Brief of respondents Joseph R. Ramirez, Julia Ramirez, Joshua Ramirez, and Regina Ramirez. filed.
Aug 8 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 19 2003	CIRCULATED.
Aug 19 2003	SET FOR ARGUMENT Tuesday November 4, 2003.
Aug 27 2003	Reply of petitioner Jeff Groh filed. (Distributed)
Aug 28 2003	Record received from U.S.C.A. for the 9th Circuit. (1 envelope)
Sep 3 2003	Record received from the U.S.D.C. for the District of Montana. (2 volumes)
Oct 6 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 4 2003	Argued. For Petitioner: Richard A. Cordray; and on behalf of the United States, as amicus curiae, Austin C. Schlick, Assistant to the Solicitor General, Washington, DC. For Respondents: Vince Kozakiewicz.

Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

PARTIES TO THE PROCEEDING

The petitioner, Jeff Groh, is a federal law enforcement official who served at the time as a special agent of the United States Bureau of Alcohol, Tobacco, and Firearms. The County of Butte-Silver Bow, Montana; John McPherson, the county sheriff; Joe Lee, the county undersheriff; and various John Does were also named as defendants, but they have been dismissed from the case and are not parties to this petition. The petitioner is an individual, and so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Joseph R. Ramirez, Julia L. Ramirez, Joshua Ramirez, and Regina Ramirez are the plaintiffs in this case, and they were the appellants in the court below.

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INTRODUCTION

Petitioner respectfully requests a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

The ruling below sharply undermines the defense of qualified immunity that the Court has extended to federal, state, and local officials. The Court has consistently stressed that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Before an official may be stripped of the defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which means that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Ninth Circuit seriously misapplied this Court's precedents when it reversed the district court's judgment that petitioner was entitled to qualified immunity.

At the time petitioner acted, no controlling decision and no decision by *any* court had ruled that his actions were unlawful. Indeed, the lower courts had upheld the lawfulness of such conduct. In this situation, it was egregious error for the Ninth Circuit to invalidate the defense of qualified immunity. Indeed, on the basis of the square holdings in *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999), and *Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (per curiam), the ruling below should be summarily reversed. This disposition would strongly reaffirm the Court's admonition that officers "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *see also Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam) (summarily reversing Ninth Circuit holding that erroneously denied qualified immunity); *Saucier v. Katz*, 533 U.S. 194 (2001) (reversing Ninth Circuit holding that erroneously denied qualified immunity).

Moreover, the lower federal courts are divided on the specific constitutional issue underlying the defense of qualified immunity raised in this case. Like the District Court here, the Fifth, Eighth, and Tenth Circuits have found no violation of the Fourth Amendment where law enforcement officers have executed a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, even though the warrant itself does not include the same level of detail. In reversing the District Court, the Ninth Circuit rejected these decisions and sided instead with the Third Circuit, which has found a constitutional violation in these circumstances. Nonetheless, even that court went on to uphold qualified immunity, in square conflict with the decision below. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the circuit conflict on the Fourth Amendment issue that is cleanly presented in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is reported as *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), is reprinted in the Appendix to this petition ("Pet. App.") at 1a-12a. The Ninth Circuit's opinion reversed an order and opinion of the United States District Court for the District of Montana, which had granted summary judgment to uphold petitioner's defense of qualified immunity. The District Court's opinion is unreported and is reprinted at Pet. App. 13a-25a. The Ninth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *Id.* at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing and rehearing *en banc* on July 25, 2002. Pet. App. 3a. The Court granted a timely request for extension of the time within which to file a petition for certiorari, which was extended to and including November 22, 2002. *See id.* at 36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Search Warrant and Its Execution.

This lawsuit stems from an investigation of respondents by the United States Bureau of Alcohol, Tobacco and Firearms. The investigation occurred after federal officials received complaints and information from concerned citizens who indicated that the Ramirez family was violating federal law by possessing and using unlawful weaponry at their ranch in western Montana. *See* Pet. App. 3a-4a, 13a-15a.

The petitioner in this case is Jeff Groh, who serves as a special agent for the Bureau. In May 1996, petitioner received two reports that the Ramirezes kept automatic weapons and grenades on their ranch. *See id.* at 14a. Petitioner met with Mr. Ramirez, who showed him around the premises; no illegal weapons were in evidence, and the visit ended amicably. *See id.* In February 1997, petitioner was contacted by the undersheriff for the county, who passed on a report that the Ramirez family had automatic weapons, grenades, a grenade launcher, and a rocket launcher on their property. *See id.* at 14a-15a.

In an effort to obtain evidence concerning these allegations, petitioner sought a warrant to search the Ramirez property. He prepared an application for a search warrant and supporting affidavit, and presented them to a magistrate judge who issued the warrant. The application properly described both the place

to be searched and the objects sought, which consisted of "automatic firearms" and specified "destructive devices," including grenades, grenade launchers, and rocket launchers. Nonetheless, the warrant itself omitted the latter information: in the space provided to list the items to be seized, Groh mistakenly typed a description of the Ramirez home. *See id.* at 15a.

On March 4, 1997, petitioner accompanied other agents from the Bureau, along with the county sheriff and members of the county sheriff's department, to the Ramirez ranch in order to execute the warrant. When the officers entered the home, only Mrs. Ramirez was present. Petitioner told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." *Id.* at 4a. He also orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See id.* at 15a. The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the legal firearms that they found there. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As the officers left, petitioner gave Mrs. Ramirez a copy of the search warrant without the application or the affidavit. Nothing was seized, and no charges were ultimately filed against respondents. *See id.* at 4a, 15a.

The next day, Mrs. Ramirez faxed the warrant to her attorney, who called petitioner and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Petitioner replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized. *See id.* at 15a.

B. The District Court Proceedings.

The Ramirezes sued petitioner and the other officers who participated in the search under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983, alleging the violation of their rights under the First, Fourth, Fifth, and Ninth Amendments and under Montana law. The principal *Bivens*

claim was that the officers violated the Fourth Amendment by undertaking a search of the Ramirez property pursuant to a defective search warrant. *See* Pet. App. 2a. Petitioner and the other defendants moved to dismiss all of the claims, or in the alternative for summary judgment, raising the defense of qualified immunity. *See id.* at 13a-14a.

The District Court treated the motion as one for summary judgment and ruled for the defendants. The court held that there was no constitutional violation and, in the alternative, upheld the defense of qualified immunity. The court correctly recognized that to analyze the qualified immunity defense, it "must first consider whether a constitutional violation occurred. Only if a violation occurred does the analysis progress to question whether the right was clearly established at the time of the violation." Pet. App. 19a. The court concluded that there was *no* authority – binding or otherwise – holding that petitioner's conduct violated the Fourth Amendment at the time he had acted and, in addition, that his conduct was objectively reasonable. *See id.* at 22a-23a. Respondents' remaining constitutional and state-law claims were also dismissed. *See id.* at 23a-24.

C. The Decision by the Court of Appeals.

With respect to every defendant other than petitioner, the Ninth Circuit affirmed. With respect to petitioner, however, the court of appeals reversed, holding that he had violated respondents' rights under the Fourth Amendment and was not entitled to qualified immunity. On the constitutional issue, the court relied on its decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), which did not even issue until months after the search warrant was executed in this case, and declined to apply this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which had recognized a "good faith" exception to the Fourth Amendment where officers execute a search warrant that was previously approved by a judicial officer, as was true here. *See* Pet. App. 4a-5a.

The Ninth Circuit's subsequent decision in *McGrew* also was cited to support the court's ruling adverse to petitioner on

qualified immunity. *See id.* at 9a. The court paid no attention to the timing of this ruling, and instead emphasized its own factual assessment that petitioner was the "leader" of the search. In the court's view, this meant that before petitioner helped execute the search warrant, he had a distinct obligation to reread it to discover any flaws lurking in its terms, even after it had already been approved by a judicial officer. *See id.* at 8a-10a. In the court's judgment, petitioner's failure to do so made his conduct in executing the warrant "objectively unreasonable" and stripped him of any defense of qualified immunity. *See id.*

A timely petition for rehearing was denied with minor amendments to the panel opinion, *see id.* at 3a, and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This petition raises an issue that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: how should courts evaluate a defense of qualified immunity when there is no binding authority from the Supreme Court or the Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question? In particular, where the lower courts had held that essentially the same conduct was *lawful* at the time, is it proper for a court to reject a defense of qualified immunity and can such a ruling be squared with the Court's precedents? Petitioner suggests that the correct answer is clearly in the negative, and that the Court's precedents directly mandate a summary reversal in this case on the issue of qualified immunity.

In addition, the lower courts are now squarely divided on the underlying constitutional issue posed in this case: whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they execute a warrant that was approved by a judicial officer but lacks the same level of detail that was provided in the application and supporting affidavit. The Ninth Circuit has sided with the Third Circuit, against the Fifth, Eighth and Tenth Circuits, by finding a constitutional

violation on the facts of this case. This division in authorities is tremendously significant for law enforcement officials, whose recurring duties include the execution of warrants that have been approved by a judicial officer even though they may include textual errors and may be issued in reliance upon other supporting documents. Moreover, the chill that would be cast on all law enforcement activity by requiring officers to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages – even in situations where they acted in good-faith reliance on prior judicial approval of the terms of a warrant – is intolerable and cannot be reconciled with the purposes of qualified immunity.

I. THE NINTH CIRCUIT BROKE WITH COURT PRECEDENT BY HOLDING THAT PETITIONER VIOLATED CLEARLY ESTABLISHED LAW AT A TIME WHEN NO CONTROLLING DECISION SO HELD AND THE COURTS HAD RULED HIS CONDUCT LAWFUL.

The ruling below departs radically from the doctrine of qualified immunity that the Court has extended to state and local officials. The Court has consistently held that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow*, 457 U.S. at 818. To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. The core issue in this case is whether a court can properly deny qualified immunity when no controlling authority from the Supreme Court or the relevant lower court of last resort has addressed the specific legal issue at stake. Under the Court's uniform line of recent rulings, a court clearly cannot do so. *See, e.g., Saucier*, 533 U.S. at 201; *Wilson*, 526 U.S. at 617; *Hanlon*, 526 U.S. at 810.

Here, the Ninth Circuit squarely and seriously misapplied the Court's precedents. In refusing to extend qualified immunity to petitioner, the court below purported to rely on its *McGrew* decision, which did not even issue until months after the underlying events in this case had occurred. *See* Pet. App. 9a. Indeed, at the time petitioner acted, the *only* judicial decision on point in the Ninth Circuit was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's criminal conviction. At best, the question of whether an unincorporated affidavit could be considered in deciding whether the good faith exception to the exclusionary rule applied was an open question in the Ninth Circuit on March 4, 1997, when petitioner executed the search warrant in this case. *See, e.g., United States v. Towne*, 997 F.2d 537, 547-50 (9th Cir. 1993) (rejecting a "flat rule" that a supporting affidavit must be physically attached to a warrant because the Constitution does not "draw the line between lawful and unlawful searches according to the presence or absence of a staple, a paper clip, a bit of tape, or a rubber band," and suggesting the "good faith" doctrine may apply even where warrant does not incorporate affidavit by reference); *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982) (holding that search warrant may be construed with reference to accompanying application, but not requiring application to accompany warrant in all cases).

In fact, at the time petitioner acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that his actions were unlawful. In this posture, the Ninth Circuit could not legitimately invalidate the defense of qualified immunity. *See, e.g., Saucier*, 533 U.S. at 201; *Wilson*, 526 U.S. at 617; *Hanlon*, 526 U.S. at 810. Here the District Court analyzed the issue in these terms, but the Ninth Circuit failed to do so. *Compare* Pet. App. 22a-24a *with id.* at 7a-10a.

Nor may a court in this situation saddle public officials with personal liability in money damages merely because the court is adamantly persuaded that its own legal judgments should have been obvious on their face to everyone. Government officials lose the shield of qualified immunity only when the

unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In this case, moreover, the merits of the underlying Fourth Amendment issues are not obvious, even today, to many judges who are vested with the authority to address them. *See infra* Part II.

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their responsibilities with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Only by faithful application of the settled principles established by this Court can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Without steady application of these principles, officers will be subjected to "undue interference with their duties" and "potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994).

Summary reversal is therefore warranted in this case, and would strongly reaffirm the Court's previous admonition that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. Indeed, the Court has not been reluctant to use the mechanism of summary reversal to overturn prior Ninth Circuit rulings that mishandled the qualified immunity issue, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 343, 341).

The importance of close adherence to these principles in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial," is manifest. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). And, again, that is especially so

where, as here, this particular lower court has so frequently departed from the Court's precedents in this area. *See, e.g.*, *Hunter*, 502 U.S. at 229 (summary reversal of Ninth Circuit decision misapplying law on qualified immunity); *see also Hanlon*, 526 U.S. at 810 (*per curiam* reversal of Ninth Circuit ruling that wrongly denied qualified immunity to law enforcement officers); *Saucier*, 533 U.S. at 201 (reversing Ninth Circuit holding that erroneously denied qualified immunity); *cf. County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (reversing on substantive constitutional grounds Ninth Circuit holding that erroneously denied qualified immunity); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (reversing on procedural grounds Ninth Circuit holding that erroneously denied qualified immunity).

II. THE CIRCUITS ARE SPLIT ON WHETHER OFFICERS VIOLATE THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT BY EXECUTING A WARRANT APPROVED BY A COURT BASED ON AN ATTACHED AFFIDAVIT WHERE THE WARRANT DOES NOT CONTAIN THE SAME LEVEL OF DETAIL.

The circuit courts of appeals are also divided on the specific constitutional issue that underlies the defense of qualified immunity raised in this case: whether law enforcement officers violate the particularity requirement of the Fourth Amendment by executing a warrant that was approved by a court based on an attached application and affidavit that are sufficiently particular, where the warrant itself does not contain the same level of detail.

Like the District Court here, the Fifth, Eighth, and Tenth Circuits have found that law enforcement officers do not violate the Fourth Amendment by executing a warrant in these circumstances. In reversing the District Court, the Ninth Circuit cast its lot instead with the Third Circuit, which has found a constitutional violation on similar facts. Even the Third Circuit, however, has been unwilling to go so far as to deny a defense of qualified immunity in this situation. Instead, it correctly adhered to this Court's analogous precedents applying the "good faith"

doctrine in *Leon* and its progeny and thus determined that officers cannot be held personally liable in damages for executing a warrant in this situation. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented here on the underlying Fourth Amendment issue.[1]

The District Court here applied a line of cases building on this Court's "good faith" doctrine, as initially laid down in *Leon*, to conclude that the Fourth Amendment was not violated. It described the facts here as "comparable to cases in which warrants contain inaccurate addresses. Such warrants do not necessarily violate the Constitution; a violation occurs only if the premises is not sufficiently described to enable officers to locate the correct address or if there is a reasonable probability that the officers will search the wrong house." Pet. App. 22a (citing cases). The court noted that it was undisputed in this case that petitioner "immediately faxed Plaintiffs' counsel the face page of the application, showing the correct description of items to be seized, when he was notified of the mistake," which further evidenced his good faith. *Id.* at 21a. The court also noted the presence of additional key undisputed facts: (i) the description in the application was not overbroad; (ii) respondents knew what items the officers sought; and (iii) the officers participating

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[1] The Court has now repeatedly explained its methodology in qualified immunity cases, under which courts "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson*, 526 U.S. at 609; *Lewis*, 523 U.S. at 841 n.5; *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Accordingly, there is no procedural hurdle to the Court's consideration of the Fourth Amendment issue if it decides to grant plenary review in this case, since that issue would be decided first and, if petitioner were to prevail on the constitutional issue, it would be unnecessary to reach the qualified immunity issue at all. *See, e.g., Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (resolving qualified immunity case by deciding only constitutional due process issue); *Lewis*, 523 U.S. at 839-55 (same).

in the search clearly knew what they were looking for. *See id.* at 21a-22a.

The Fifth Circuit's decision in *United States v. Cherna*, 184 F.3d 403 (5th Cir. 1999), *cert. denied*, 529 U.S. 1065 (2000), embraces the same position. There the defendant in a criminal proceeding complained that the search warrant was insufficiently particular, and that the defect was not cured by a related affidavit that was not attached to the warrant. The court rejected this argument, relying principally on *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), a companion case to *Leon*, which the Fifth Circuit described as "[t]he seminal Supreme Court case on particularity and the good-faith exception." *Cherna*, 184 F.3d at 411. In the end, the court held that "the warrant in this case was not so lacking in particularity that the executing officers could not reasonably presume it to be valid" because:

> . . . the issuing judge in this case made a probable cause determination, the affidavit explained in detail the alleged mail and wire fraud scheme that was the target of the investigation and search, the officer in charge of the search . . . was the affiant, and . . . [e]ven assuming that the absence of the affidavit rendered the warrant constitutionally defective, this defect could have been corrected with only minor corrections, such as the attachment of the affidavit.

Id. at 412. In these circumstances, the "Fourth Amendment does not demand that the executing officers question [the issuing judicial officer's] decision and determine for themselves whether the warrant is, in fact, valid." *Id.* (citing *Sheppard*, 468 U.S. at 989-90). Other Fifth Circuit precedents are in accord. *See, e.g., United States v. Shugart*, 117 F.3d 838, 845-46 (5th Cir.), *cert. denied*, 522 U.S. 976 (1997) (officers reasonably could rely on warrant that was insufficiently particular on its face and did not incorporate affidavit on which it was based, and officers in that situation would be able to assert their good faith); *United States v. Beaumont*, 972 F.2d 553, 560-61 (5th Cir. 1992) (same).

In *Cherna*, indeed, the Fifth Circuit expressly noted the disharmony between its approach and the Ninth Circuit's approach in *McGrew*, which was further reinforced and elaborated in the decision below. *See Cherna*, 184 F.3d at 413 (citing *McGrew* with disapproval as holding that if the "'affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents'") (quoting *McGrew*, 122 F.3d at 850).

The Fifth Circuit in *Cherna* also had cited the Tenth Circuit as taking a contrary position more akin to the Ninth Circuit's approach. *See Cherna*, 184 F.3d at 413 (citing *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993)). In *Dahlman*, the Tenth Circuit had indeed indicated that an affidavit not specifically incorporated in or physically attached to a warrant cannot cure a lack of particularity. *See id.* But in subsequent cases, the Tenth Circuit has relaxed this requirement, holding that an affidavit not incorporated in or attached to a warrant can be used to demonstrate that a warrant is not constitutionally invalid for lack of particularity, at least where the same officer both produced the affidavit and executed the warrant. *See United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998); *United States v. Ortega-Jimenez*, 232 F.3d 1325, 1328-19 (10th Cir. 2000) (same).

The Eighth Circuit likewise has adopted an approach that squares with the District Court's ruling in this case, but is in direct conflict with the Ninth Circuit's decision. In *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990), the court held that where a clerical error caused the warrant to omit any address or description of the place to be searched whatsoever, the warrant was defective for lack of particularity and this defect could not be cured by reference to the original affidavit. Nonetheless, the court allowed the affidavit that had been submitted with the original warrant application to be used to demonstrate the good faith of the officers and upheld the search under *Leon*. In that instance, the court stressed that the application and affidavit both contained the correct address; there was no evidence of bad faith on the part of the officers; the search was executed by the affiant; and the responsibility for the error should lie not with

the officers but with the judge who issued the warrant. *See id.* at 76-77. It is noteworthy that each factor is established in this case as well, yet the Ninth Circuit reached the exact opposite decision on the constitutional issue. The Eighth Circuit has since confirmed its position by reaffirming *Curry* on similar facts. *See United States v. Thomas*, 263 F.3d 805, 808-09 (8th Cir. 2001), *cert. denied*, 534 U.S. 1146 (2002).

Finally, the Third Circuit has taken the side of the Ninth Circuit on the underlying constitutional issue. In explicit reliance on *McGrew*, the Third Circuit has held that a lack of particularity in a search warrant cannot be cured by reference to underlying affidavits that have been placed under seal with the Court. *See Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (3d Cir. 2000). In those circumstances, the court held, the warrant itself must contain a specific description of the items to be seized to avoid a violation of the Fourth Amendment. *See id.* The court did not discuss the good faith doctrine, but went on to conclude that since no controlling law had so held prior to its decision, the officers would be accorded qualified immunity. *See id.* at 429-30.

The evident result of these decisions is a direct and irreconcilable conflict, which will prove dispositive on the very same claims when they are brought in different courts in different parts of the country. The Third and Ninth Circuits have held that law enforcement officers cannot reference the initial application and affidavit to show their good faith and avoid a constitutional violation in executing a warrant that is insufficiently particular, even though it was approved and issued by a judge. The Fifth, Eighth, and Tenth Circuits, in numerous decisions, have held directly to the contrary. In this case, the Ninth Circuit has reaffirmed the split among the circuits on this issue of real practical importance in day-to-day law enforcement. It is undeniable, therefore, that law enforcement officers and potential plaintiffs throughout the country will continue to have their legal claims resolved inconsistently without some manner of intervention by this Court.

Indeed, on the basis of the Court's square holdings on the

"good faith" doctrine in the *Leon* and *Sheppard* cases, it seems clear enough that the ruling below should be summarily reversed. In *Sheppard*, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Sheppard* was that a warrant to search for controlled substances was insufficiently particular when the accompanying affidavit indicated that the affiant actually wished to search for evidence relating to a homicide investigation. It was undisputed that the issuing judge and the executing officers knew the contents of the affidavit and the focus of the search; indeed, the affiant had pointed out the discrepancy to the judge, who nonetheless approved the issuance of the warrant. *See Sheppard*, 468 U.S. at 985-86. On these facts, this Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable, despite its acknowledged defects. *See id.* at 989. Indeed, as this Court expressly noted in rejecting the constitutional claim in that case:

> This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant." . . . Indeed, Sheppard admits that if the judge had crossed out the reference to controlled substances, written "see attached affidavit" on the form, and attached the affidavit to the warrant, the warrant would have been valid.

Id. at 990 n.7. The same is true in the case at hand.

The intersection of the qualified immunity issue with the underlying Fourth Amendment issue makes this case of exceptional importance. In the many states and localities encompassed by the Ninth Circuit, its holding will effectively require law enforcement officers to double-check and second-guess judges who have approved and issued warrants, upon pain of incurring personal liability for monetary damages and losing valuable evidence in criminal trials. That regime is in complete disharmony with the "good faith" doctrine that this Court established in the *Leon* and *Sheppard* decisions.

Finally, the regime of qualified immunity laid down by these court below is untenably strict. At present, various federal

judges sharply disagree about the merits of the underlying constitutional issues applying the Fourth Amendment. Yet law enforcement officers in the Ninth Circuit are now being held personally liable for having to make guesses in gray areas of the law, and not simply for transgressing bright lines. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Petitioner belongs in neither category here. This Court has repeatedly warned the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562; *see also id.* at 563-65 & nn.8-10. Either summary reversal or a grant of *certiorari* is necessary in this case to reinforce this point to the lower courts once again.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed in this case. In the alternative, the petition for a writ of *certiorari* should be granted and the case set for plenary review on the merits of the Fourth Amendment and qualified immunity issues.

Respectfully submitted,

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November 2002

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Joseph R. RAMIREZ; Julia L. Ramirez; Joshua Ramirez; Regina Ramirez,
Plaintiffs-Appellants,
v.
BUTTE-SILVER BOW COUNTY; John McPherson, Sheriff of Butte-Silver Bow County;
Joe Lee, Undersheriff of Butte-Silver Bow County; John Does 1-50, in their
individual and/or official capacities, Defendants,
and
Jeff Groh, Special Agent with The Bureau of Alcohol, Tobacco, and Firearms,
Defendant-Appellee.
Joseph R. Ramirez; Julia L. Ramirez; Joshua Ramirez; Regina Ramirez,
Plaintiffs-Appellants,
v.
Butte-Silver Bow County; John McPherson, Sheriff of Butte-Silver Bow County;
Joe Lee, Undersheriff of Butte-Silver Bow County; Jeff Groh, Special Agent
with The Bureau of Alcohol, Tobacco, and Firearms;
John Does 1-50, in their
individual and/or official capacities,
Defendants-Appellees.

Nos. 99-36138, 00-35955.

Argued Sept. 10, 2001.
Submission Deferred Sept. 10, 2001.
Submitted and Filed March 13, 2002.
Amended July 25, 2002.

Homeowners brought *Bivens* and § 1983 action against federal and county law enforcement officers, alleging that their Fourth Amendment rights were violated. The United States District Court for the District of Montana, Donald W. Molloy, Chief District Judge, granted defendants' motion for summary judgment, and homeowners appealed. Amending its prior opinion, 283 F.3d 985, the Court of Appeals, Kozinski, Circuit Judge, held that: (1) search warrant failed to comply with Fourth Amendment; (2) rank and file officers on search team were entitled to qualified immunity; but (3) leader of search team was not entitled to qualified immunity; and (4) search was not unconstitutional as a privacy violation.

Affirmed in part and reversed in part.

***1024** Vincent J. Kozakiewicz, Boise, ID, and W.G. Gilbert III, Dillon, MT, argued the cause for the appellants.

William W. Mercer, Assistant United States Attorney, Billings, MT, and Brendon J. Rohan, of Poore, Roth & Robinson, P.C., Butte, MT, argued the cause for the appellees. Deanne L. Sandholm, Assistant U.S. Attorney, Helena, MT, assisted on the brief.

Appeals from the United States District Court for the District of Montana, Donald W. Molloy, District Judge, Presiding. D.C. No. CV-99-00017-DWM.

Before: KOZINSKI and GOULD, Circuit Judges, and SCHWARZER, District Judge.[1]

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1 The Honorable William W Schwarzer, United States Senior District Judge for the Northern District of California, sitting by designation.

ORDER

The Opinion filed March 13, 2002, is amended as follows:

***1025** 1. At page 4170, [283 F.3d 985, 988] line 9 of the slip opinion, replace "*Id.*" with "*Id.* (quoting *United States v. Hillyard,* 677 F.2d 1336, 1340 (9th Cir.1982) (internal quotation marks omitted)).".

2. At page 4171, [283 F.3d at 989] footnote 1, line 8 of the slip opinion, replace "quoting" with "citing".

3. At page 4174, [283 F.3d at 991] lines 11-12 of the slip opinion, replace "qualified immunity because, according" with "qualified immunity. According".

With these amendments, the petition for rehearing is denied and the petition for rehearing en banc is rejected. Fed. R.App. P. 35, 40.

OPINION

KOZINSKI, Circuit Judge.

We consider whether and under what circumstances law enforcement officers who execute a search pursuant to a defective warrant enjoy qualified immunity.

I

Agent Jeff Groh of the Bureau of Alcohol, Tobacco and Firearms ("BATF") received two reports that the Ramirezes kept an automatic rifle, a rocket launcher, a grenade launcher and grenades on their ranch in western Montana. Groh prepared an application for a search warrant and supporting affidavit, and presented them to a magistrate judge who issued the warrant. The application properly described both the place to be searched

and the objects sought. However, the warrant itself omitted the latter information entirely: In the space provided to list the items to be seized, Groh mistakenly typed a description of the Ramirez home.

Groh led BATF agents and members of the county sheriff's department, including Sheriff John McPherson and Undersheriff Joe Lee, in the execution of the warrant. When the officers entered the Ramirez home, only Mrs. Ramirez was present. Groh told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the Ramirezes' legal firearms. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As Groh left, he gave Mrs. Ramirez a copy of the defective search warrant; neither the application nor the affidavit were attached. Nothing was seized, and no charges were subsequently filed against the Ramirezes.

The next day, Mrs. Ramirez reached her attorney and faxed him the warrant. The attorney then called Groh and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Groh replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized.

The Ramirezes sued the officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and 42 U.S.C. § 1983, for violation of their Fourth Amendment rights. The district court granted summary judgment to defendants, holding that there was no constitutional violation and defendants enjoyed qualified immunity in any case. The Ramirezes also brought two other *Bivens* and section 1983 claims, *see* Parts III & IV *infra,*

but the district court ruled against them on those as well. The Ramirezes appeal.

II

A. Was there a Fourth Amendment violation?

To satisfy the Fourth Amendment, a search warrant must describe with ***1026** particularity the place to be searched and the items to be seized. U.S. Const. amend. IV; *United States v. Sayakhom,* 186 F.3d 928, 934 (9th Cir. 1999). The particularity requirement protects the individual from a "general, exploratory rummaging in [his] belongings." *United States v. Lacy,* 119 F.3d 742, 746 n.7 (9th Cir. 1997) (quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). It does so both by "limit[ing] the officer's discretion" and by "inform[ing] the person subject to the search what items the officers executing the warrant can seize." *United States v. McGrew,* 122 F.3d 847, 850 (9th Cir. 1997) (emphasis removed).

We addressed the particularity requirement in *McGrew,* where federal agents searched the home of a suspected drug trafficker. The warrant itself did not specify the evidence sought. Rather, in the space provided for that information, it referred to the "attached affidavit which is incorporated herein." *Id.* at 848. However, agents never served McGrew with a copy of the affidavit, either during or after the search. *Id.* at 849.

According to the "well settled law of this circuit," a warrant "may be construed with reference to the affidavit . . . if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit." *Id.* (quoting *United States v. Hillyard,* 677 F.2d 1336, 1340 (9th Cir. 1982) (internal quotation marks omitted)). When officers fail to attach the affidavit to a general warrant, the search is rendered illegal because the warrant neither limits their

discretion nor gives the homeowner the required information. *Id.* at 850.

Appellees concede that the warrant here was facially defective because it provided no description of the evidence sought. It also didn't refer to or incorporate the application or affidavit. Groh attached no documents to the warrant when he served it on Mrs. Ramirez. Nonetheless, appellees argue that *McGrew* does not control and that the search was lawful because Groh's words remedied the defect. According to Groh, he spoke at length with the Ramirezes during the search--Mrs. Ramirez in person, Mr. Ramirez on the telephone--and listed all of the items sought. However, the Ramirezes claim that Groh spoke only to Mrs. Ramirez, and told her simply that the officers sought "an explosive device in a box."

This factual dispute is immaterial: Groh could not have cured the flaw because he lacked the authority to amend the warrant. As a law enforcement officer, Groh was empowered only to execute the warrant. Therefore, he could no more have supplemented it verbally than he could have amended it by crossing out the terms approved by the magistrate and scribbling new ones in the margins. The only way Groh could have remedied the defect in the warrant was to ask a magistrate to issue a corrected version. *McGrew* therefore controls and the warrant failed to comply with the Fourth Amendment.[2]

---

2 Appellees also argue that, because their good faith reliance on the properly completed warrant application would make any seized evidence admissible, *see United States v. Gantt,* 194 F.3d 987, 1005-06 (9th Cir. 1999) (discussing the good faith exception to the exclusionary rule), that good faith precludes a finding that the search violated the Fourth Amendment. *McGrew* forecloses this argument. We held there that if the affidavit "does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents." 122 F.3d at 850 (citing *United States v. Kow,* 58 F.3d 423, 428-30 (9th Cir. 1995)).

Our holding is consistent with the goals of the particularity requirement, which went unfulfilled here despite Groh's alleged ***1027** oral statements. First, the absence of a sufficiently particular warrant increased the likelihood and degree of confrontation between the Ramirezes and the police. The presence of a comprehensive and valid warrant "greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Illinois v. Gates,* 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (internal quotation marks omitted).

Second, the invalid warrant deprived the Ramirezes of the means to be on the lookout and to challenge officers who might have exceeded the limits imposed by the magistrate. "Citizens deserve the opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence." *United States v. Gantt,* 194 F.3d 987, 991 (9th Cir. 1999). Such a dialogue is impossible if citizens must rely on officers' verbal representations of the scope of their authority. To stand a real chance of policing the officers' conduct, individuals must be able to read and point to the language of a proper warrant.

Third, permitting officers to expand the scope of the warrant by oral statements would broaden the area of dispute between the parties in subsequent litigation. The parties' disagreement over exactly what Groh said during the search, and to whom he said it, is immaterial because the warrant must contain all authorizations and limitations in writing.

B. Are Defendants Protected by Qualified Immunity?

Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions

result in a constitutional violation.[3] *Wilson v. Layne,* 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *Marks v. Clarke,* 102 F.3d 1012, 1026 (9th Cir. 1996). What's reasonable for a particular officer depends on his role in the search. Because searches often "require[ ] cooperation and division of labor," *Guerra v. Sutton,* 783 F.2d 1371, 1375 (9th Cir. 1986), officers' roles can vary widely. Typically, only one or a few officers plan and lead a search, but more--perhaps many more--help execute it. The officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions. A key aspect of this responsibility is making sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct. The leaders of the expedition may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way. *See United States v. Leon,* 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (search pursuant to a warrant is invalid if no reasonable officer could have believed the warrant was valid). The leaders of the search team must also make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search,[4] and that such copy has no missing pages or other obvious defects.

***1028** Line officers, on the other hand, are required to do much less. They do not have to actually read or even see the warrant; they may accept the word of their superiors that they

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3 While the Ramirezes sued the federal officers under *Bivens* and the county officers under section 1983, "the qualified immunity analysis is identical under either." *Wilson v. Layne,* 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

4 We note that in this case Agent Groh did not serve a copy of the warrant on Mrs. Ramirez until after the search was completed. Of course, this was much too late. *See Gantt,* 194 F.3d at 1000-01.

have a warrant and that it is valid. *Guerra,* 783 F.2d at 1375; *Marks,* 102 F.3d at 1029-30. So long as they "ma[k]e inquiry as to the nature and scope of [the] warrant," *Guerra,* 783 F.2d at 1375, their reliance on leaders' representations about it is reasonable. *Id.; Marks,* 102 F.3d at 1029-30. The line officers here acted reasonably: They were told that a warrant had been obtained and learned through an advance briefing what items could be seized. *Guerra,* 783 F.2d at 1375; *Marks,* 102 F.3d at 1030. Because they were not required to read the warrant, the line officers conducting this search cannot reasonably have been expected to know that it was defective.

The Ramirezes argue that none of the officers enjoy qualified immunity because, under *McGrew,* all of them--leaders and line officers alike--should have known that the defective warrant made the search illegal. *McGrew,* 122 F.3d at 850 n.5. But *McGrew* said nothing about the different duties of leaders and line officers. We held only that "[i]t is the *government's* duty," not the duty of any particular officer, to serve a sufficiently particular warrant. *Id.* at 850 (emphasis added). Because we were reviewing the denial of a motion to suppress, we had no occasion to address the allocation of responsibilities between leaders and the rank and file.

The record identifies only Groh as the leader of the search. He received two reports of illegal weapons, obtained and served the warrant, conducted the pre-search briefing and supervised the search itself. However, he neglected to check the warrant for errors. The presence of errors in a warrant does not automatically deprive search leaders of immunity. The question is whether the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it. *Cf. Arnsberg v. United States,* 757 F.2d 971, 981 (9th Cir. 1985) (holding that a search conducted pursuant to a facially flawed warrant did not violate the Fourth Amendment because "the discrepancy [was] not a serious

one"). Even the most careful proofreaders let mistakes slip by, especially when checking their own work.

Nevertheless, Groh is not entitled to qualified immunity. According to his own affidavit, he did not read the warrant after the magistrate issued it and before he began the search. Had he done so, he would surely have realized that it did not contain a list of items to be seized and was therefore facially defective. He would then have been able to correct the error before going forward with the search. In most cases, "an officer cannot be expected to question the magistrate's . . . judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S. at 921. But "the officer's reliance on [that judgment] must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* at 922-23 (citation omitted). No reasonable grounds exist here: The warrant was "so facially deficient . . . in failing to particularize the place to be searched or the things to be seized" that, had Groh read it, he could not "reasonably [have] presume[d] it to be valid." *Id.* at 923.

It is possible that Groh shared authority over the search with other officers, such as Sheriff McPherson and Undersheriff Lee. However, nothing in the record indicates this was the case. Therefore, all officers except Groh are protected by qualified immunity.

***1029 III**

The Ramirezes also appeal the dismissal of their claim that the officers violated their right to privacy as protected by the Fifth and Ninth Amendments. This claim has two parts. First, the Ramirezes argue that the officers violated their right to privacy by notifying the media of the search immediately before it was executed. They claim that the resulting publicity damaged their standing in the community.

Although the Ramirezes present this claim as one for invasion of privacy, the circumstances of the search show that it is actually a defamation claim. Nothing in the record suggests that the media gained access to the Ramirez property. Whatever information the media obtained during the raid was gathered from the road adjacent to the ranch, where any member of the public could have observed the goings on. *Cf. Hanlon v. Berger*, 526 U.S. 808, 809-10, 119 S. Ct. 1706, 143 L. Ed. 2d 978 (1999) (holding that police violated the Fourth Amendment by allowing a media crew to accompany them onto the premises and observe a search); *Wilson*, 526 U.S. at 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 ("[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant . . . ."). Therefore, the only harm that the Ramirezes can show they have suffered is reputational injury, from which the Constitution offers no protection. *Siegert v. Gilley*, 500 U.S. 226, 233-34, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

The Ramirezes also argue that the search itself violated not only their right to be free from unreasonable searches and seizures, but also their right to privacy. "[C]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996). However, the Supreme Court has held that plaintiffs cannot "double up" constitutional claims in this way: Where a claim can be analyzed under "an explicit textual source" of rights in the Constitution, a court may not also assess the claim under another, "more generalized," source. *Graham v. Connor*, 490 U.S. 386, 394-95, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (analyzing claim under Fourth Amendment but not under substantive due process); *see also Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001) (analyzing claim under First Amendment but not under substantive due process); *Armendariz*, 75 F.3d at 1319 (analyzing claim under Fourth and Fifth Amendments but not under substantive due process). Here, because the Fourth

Amendment supplies an explicit textual source of constitutional protection against unlawful searches, that Amendment, and not the more general right to privacy, governs the constitutionality of the search.

IV

Finally, the Ramirezes appeal the dismissal of their claim that each of the officers is liable as a bystander for failing to intercede and prevent his co-defendants' constitutional violations. *See United States v. Koon,* 34 F.3d 1416, 1424-25 (9th Cir. 1994), *rev'd on other grounds,* 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). The district court dismissed this claim on the basis of its holding that no constitutional violation existed.

As to the line officers, this claim is foreclosed by our ruling that they had no duty to read the warrant and therefore could not have known that the warrant was defective. They cannot therefore reasonably be held liable for failing to intercede. As to Groh, it is clear from the record that he was not aware that the warrant was defective until long after the search was completed,***1030** when he spoke to the Ramirezes' attorney. Groh cannot be held liable for failing to stop a search he did not know was illegal.

AFFIRMED in part and REVERSED in part. No costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ AND REGINA RAMIREZ,	)	CV 99-17-BU-DWM
Plaintiffs,	)	
vs.	)	ORDER
COUNTY OF BUTTE-SILVER BOW; JOHN McPHERSON, SHERIFF OF BUTTE-SILVER BOW COUNTY; JOE LEE, UNDERSHERIFF OF BUTTE-SILVER BOW COUNTY; JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, and JOHN DOES 1-50, named in their individual and/or official capacities,	)	
Defendants.	)	

Before the Court is the motion of AFT Agent Jeff Groh to dismiss Plaintiffs' claims against him or, in the alternative, for summary judgment on the basis of qualified immunity.

This case stems from the execution of an admittedly facially defective search warrant at the home of the Ramirez family on

March 4, 1997. Agents of the Bureau of Alcohol, Tobacco, and Firearms and law enforcement employees of Butte-Silver Bow County participated in the search. Plaintiffs seek damages for violations of their First, Fourth, Fifth, and Ninth Amendment rights against the Federal Defendants (AFT Agent Jeff Groh and John Does 26-50) and for violations of their First, Fourth, Fifth, and Fourteenth Amendment rights against the State Defendants (Butte-Silver Bow officers). The present motion to dismiss or, in the alternative, for summary judgment, was brought by the Federal Defendants and argued on the grounds that the complaint failed to state an actionable claim for relief and that there is qualified immunity for the actions involved.

1. Factual Background

In May, 1996, ATF Agent Jeff Groh received reports of automatic weapons fire and of the presence of grenades at and around the Ramirez home. Search Aff. at 2. He also received a report from a concerned building contractor who had seen automatic weapons in and around the Ramirez home while he was building a 3-foot storage space into the floor of Ramirez' bedroom. Search Aff. at 1. Agent Groh contacted Ramirez, and Ramirez agreed to meet Agent Groh and show him around the premises. Agent Groh observed a Norinco MAC-90, not altered for automatic fire, and an upstairs ammunition room with reloading presses and other reloading components. Agent Groh saw no hand grenades or automatic weapons. He did not look in closets or in any rooms other than the upstairs bedroom/reloading room. Nor did he look under the floor in Ramirez' bedroom. The visit ended amicably. Search Aff. at 2.

In February, 1997, Undersheriff Joe Lee of Butte-Silver Bow County contacted Agent Groh about Ramirez. An ex-Marine and friend of the Ramirez family had reported seeing an AK-47, "blooper" grenades, a military-type grenade launcher,

and "some sort of rocket launcher" in one or more of his frequent visits to the Ramirez home.[1] Search Aff. at 2-3.

Based on this information, Agent Groh applied for a search warrant on March 3, 1997. The Search Warrant issued on that date inaccurately lists "[a] single dwelling residence two story in height which is blue in color . . ." as the item to be seized. The Application and the Affidavit both state that the agents were looking for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."

While executing the warrant during the search, Agent Groh allegedly orally described the items involved in the search warrant to Judy Ramirez and to Joseph Ramirez. Joseph Ramirez was not present but spoke with Agent Groh on the telephone. Groh Aff. ¶ 7. At oral argument, Ramirez did not dispute this allegation. The Agent alleges that he also told the agents participating in the search of its object. Groh Aff. ¶ 6. Ramirez does not dispute this allegation. When the search was over, Agent Groh gave Judy Ramirez a copy of the Search Warrant describing the two-story blue house as the item to be seized. Groh Aff. ¶ 8. The Application and Affidavit were not attached to the material he gave her. The agents found nothing in their search. No charges were brought against any member of the Ramirez family. However, a media crew stood just outside the Ramirez' property and apparently videotaped the agents' activities during the search.

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1 This informant was charged with a felony in 1994, resulting in a misdemeanor conviction. Agent Groh mistakenly informed Judge Holter that the friend had only misdemeanor arrests in Minnesota, California, and Washington, the most recent being in 1989. Plaintiffs do not contend that this mistake is evidence of Agent Groh's intent to do them harm.

The day after the search, the Ramirez' counsel demanded a copy of the Search Application and Supporting Affidavit. Agent Groh allegedly then sent to Plaintiffs' counsel the face page of the Application describing the items to be seized. Groh Aff. ¶ 8. Groh did not send the entire application, as that document remained under seal by court order until October 1998. Since the search, Plaintiffs allege they have been subjected to "unwanted stares in public, unwanted publicity and damage to their reputation" and the termination of their accounts at Norwest Bank.

Ramirez filed a complaint against the ATF agents and against the sheriff and undersheriff of Butte-Silver Bow County on March 4, 1999, alleging violations under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The Federal Defendants now move to dismiss for failure to state a claim or, in the alternative, for summary judgment based on qualified immunity. I find the motions are well-taken.

2. Failure to State a Claim

A. Do Plaintiffs state a claim under the Fifth or Ninth Amendments?

Neither Plaintiffs nor the Court located a case allowing recovery in constitutional tort on a Ninth Amendment theory.[2] Insofar as Plaintiffs' Fifth Amendment theory is a privacy-based theory, the same obstacle appears. Additionally, both the Fifth

2 Plaintiffs' argument is intriguing. Relying on the Montana Constitution's explicit privacy guarantee, they seek to enforce Montana privacy standards against the federal agents who conducted the search. Their claim can succeed only if a Fourth Amendment violation is found, however, because they say the Ninth Amendment violation "occurred because of the Fourth Amendment violation." Pltfs' Brief in Opposition at 7. If the agents could not show solid probable cause under both Federal and Montana standards, the case would be closer.

and Ninth Amendment claims are based on the Court's finding a violation of the Fourth Amendment claim – i.e., Plaintiffs claim that violating the Fourth Amendment violates the Fifth and Ninth Amendments. These claims are therefore superfluous and must be dismissed.

B. Do the Plaintiffs meet the heightened pleading standard for First and Fifth Amendment claims?

Plaintiffs' First Amendment claim involves an allegation that the police had no intent to chill religious expression; Plaintiffs' Fifth Amendment claim might be a substantive due process claim, based on the officers' allegedly enticing the media to attend the warrant's execution by providing false information about the Plaintiffs.[3] Such a claim would require the Plaintiffs to show a "purpose to cause harm unrelated to the legitimate object of arrest [to] satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." County of Sacramento v. Lewis, 118 S. Ct. 1708, 1712-13 (1998). Under Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994), Plaintiffs are therefore subject to a heightened pleading standard. Here, Plaintiffs make only conclusory allegations. In fact, they state that discovery "may" show that the federal defendants acted with evil intent. This is not sufficient, and Plaintiff's claims based on the First, Fifth, and Ninth Amendment must be dismissed.

3 To the extent this claim is based on common-law tort notions, Plaintiffs must name the United States, not the individual actors. They have not done so.

3. Summary Judgment Based on Qualified Immunity (Fourth Amendment Claim)

A. Is there a genuine factual issue for trial?

Ninth Circuit case law provided guidance as to the kinds of fact questions that can forestall summary judgment based on qualified immunity in a Fourth Amendment Bivens case:

> Where a Fourth Amendment violation is claimed, the factual issues that may preclude a determination of qualified immunity on summary judgment fall into two categories. First, a determination of . . . probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge. These are matters of fact to be determined, where genuine disputes of a material nature exist, by the fact finder. (This determination does not, however, entail an inquiry into the officer's subjective intentions, merely his knowledge.) Second, the determination of what conduct underlies the alleged violation – what the officer and claimant did or failed to do – is a determination of fact. We hold, however, that the determination whether those facts support an objective belief that probable cause . . . existed is ordinarily a question for the court. It is not in itself a factual issue that can preclude summary judgment.

Act Up!/Portland v. Bagley, 988 F.2d 868, 873 & n.3 (9th Cir. 1993) (citations omitted). This inquiry still applies even after Wilson v. Layne, 119 S. Ct. 1692 (1999), and related cases clarified the analysis for qualified immunity claims. This is because no constitutional violation can be established until the conduct constituting the alleged violation is determined.

Here, Plaintiffs do not contest the agents' knowledge as to the statements contained in the affidavit. Nor do they contest Agent Groh's assertion in his affidavit that he informed both

Plaintiffs and the other agents of the objects of the search. As a backstop allegation, Plaintiffs question whether Groh's affidavit was attached to his warrant application or put before Magistrate Holter, but the allegation is conclusory and not supported in any way by the record.

Mendocino Environmental Center v. Mendocino County, ___ F.3d ___, 1999 WL 742710 (9th Cir. Sept. 24, 1999), contains a good example of facts sufficient to defeat qualified immunity summary judgment. There, statements of FBI agents regarding the location of nails scattered by a bomb and of the hole caused by the explosion conflicted with statements of county officers. These facts were material to a determination whether the officers had probable cause to arrest the plaintiffs. No comparable factual disputes emerge from this record. Plaintiffs do not contest the agents' probable cause, except as a backstop allegation in their Statement of Material Issues of Fact; indeed, Plaintiffs have consistently argued that probable cause is irrelevant. Nor do Plaintiffs contest Agent Groh's assertion in his affidavit that he informed Plaintiffs and the other agents of the objects of the search. Thus, no material factual disputes remain to be referred to a jury, and summary judgment is appropriate.

To analyze the Federal Defendants' qualified immunity defense, the Court must first consider whether a constitutional violation occurred. Only if a violation occurred does the analysis progress to question whether the right was clearly established at the time of the violation. See Wilson, 119 S. Ct. at 1697. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Id. at 1699 (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

B. Did a constitutional violation occur?

Plaintiffs argue that, since the warrant stated that a "two-story blue house" was the object of the search, the officers overstepped their authority by opening drawers and cupboards. No two-story house could be found in a drawer or cupboard. Pltfs' Brief in Opposition at 10. Further, Plaintiffs argue that the warrant failed to particularly describe the things to be seized, so that the agents "seized" serial numbers on weapons and took pictures of the weapons in contravention of the warrant's authorization to seize only a two-story blue house. Finally, Plaintiffs argue that the warrant did not authorize a search of the outbuildings surrounding the home.

Because they fail to contest the most crucial facts, Plaintiffs' reliance on United States v. McGrew, 122 F.3d 847 (9th Cir. 1997), is misplaced. McGrew gives no indication that the officers involved in the search provided the residents of the searched home any description of the items to be seized, before, during, or after the search. The McGrew warrant referred to the affidavit's list of items to be seized, but the affidavit did not accompany the warrant. Even after the search, the officers refused to reveal any portion of the affidavit to the home's owners. The Ninth Circuit panel deciding McGrew was faced with a police force that stubbornly insisted the persons whose home was searched had no interest in independently ascertaining the particular description of the place to be searched or items to be seized. Hence, McGrew emphasized:

> "The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer's discretion and to inform the person subject to the search what items the officers executing the warrant can seize." . . . Because the agents never served a copy of the affidavit on McGrew, the second goal was entirely unsatisfied here. Neither, in all likelihood, was the first; this court has

> held expressly that "neither purpose is served" when the affidavit fails to accompany the warrant.

McGrew, 122 F.3d at 850 (quoting United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir. 1986)).

Likewise, in United States v. Kow, 58 F.3d 423 (9th Cir. 1995), the description of items to be seized in both the warrant and the application were overbroad. Id. at 429-30. Thus, the application could not cure the warrant's overbreadth.

By contrast, in this case, Plaintiffs do not contest Agent Groh's assertion that he immediately faxed Plaintiffs' counsel the face page of the application, showing the correct description of items to be seized, when he was notified of the mistake. The warrant did not refer to an accompanying affidavit, so there was no requirement that the affidavit accompany the warrant. See, e.g., United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982) (holding that search warrant may be construed with reference to application if application accompanies warrant and warrant incorporates application but not requiring application to accompany warrant in all cases).

Moreover, Plaintiffs have not contended that the description in the application was overbroad. They have not denied, even in a conclusory fashion, that they knew what items the officers sought. Plaintiffs have not contended that the officers participating in the search did not know what they were looking for. Thus, this case is distinguishable from McGrew and Kow.

Plaintiffs' argument that the search was overbroad because it extended to the outbuildings also misses the mark. The search of outbuildings in the curtilage of the home is authorized. See, e.g., United States v. Gorman, 104 F.3d 272 (9th Cir. 1996) (holding that a warrant for the home also authorizes search of the curtilage, including sheds, storerooms, and garages); United States v. Vaandering, 50 F.3d 696, 701 (9th Cir. 1995) (warrant

authorizing search of home also authorizes search of vehicles contained in the curtilage).

Finally, this case is comparable to cases in which warrants contain inaccurate addresses. Such warrants do not necessarily violate the Constitution; a violation occurs only if the premises is not sufficiently described to enable officers to locate the correct address or if there is a reasonable probability that the officers will search the wrong house. Compare, e.g., United States v. Turner, 770 F.2d 1508 (9th Cir. 1985), with United States v. Collins, 830 F.2d 145 (9th Cir. 1987).

Thus, Plaintiffs have not established that a constitutional violation occurred.

C. Are the Federal Defendants entitled to qualified immunity?

Even if the constitutional violation did occur,[4] Plaintiffs would still have to overcome Agent Groh's good faith defense to constitutional tort liability. The Supreme Court has made it clear that "[q]ualified immunity shields [agents] from suit for damages if 'a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the [law enforcement] officers possessed.'" Hunter v. Bryant, 502 U.S. 224, 227 (1991) (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)). The Court applies the same standard of "objective reasonableness" that it would apply in a suppression hearing. Ortiz v. Van Auken, 887 F.2d 1366, 1368 (9th Cir. 1989).

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4 The United States conceded at oral argument that the warrant did violate the Constitution. This is not the position it took in its brief. See Federal Defts' Brief at 7-13.

Agent Groh had sufficient probable cause to obtain a warrant. He followed all the established procedures. His information supported a search for the items listed in the application. Magistrate Judge Holter approved the warrant. A reasonable officer who was not aware of the typographical error would believe himself authorized to conduct a search for illegal weapons at the Ramirez' residence.

Plaintiffs' case against the Federal Defendants hinges solely on a typographical error on the face of the warrant, an error undetected by either Agent Groh or Magistrate Judge Holter. Plaintiffs' counsel argued at the hearing that each officer participating in the search of the Ramirez' home had an independent obligation to examine the warrant. Plaintiff has not cited any authority for that proposition, nor can I find cases to support it.

I do not look lightly on the circumstances exemplified by the problem with the warrant in this case. However, constitutional tort liability does not take aim at technical defects unless and until they rise to the level of substantive deprivations. Had Plaintiffs been unaware of the object of Agent Groh's search, they would have alleged that fact in their complaint or at least in their subsequent briefs, particularly in view of Agent Groh's assertion that he informed the Ramirez family of what he sought. They did not do so. They stand instead on the argument that showing probable cause and following established procedures are not relevant to qualified immunity. Federal case law holds otherwise. The Federal Defendants are entitled to qualified immunity for the Fourth Amendment violation alleged by Plaintiffs because Agent Groh acted in an objectively reasonable manner.

Plaintiffs' theory of bystander liability is predicated on the Federal Defendants' responsibility to protect the Ramirez family from violations of their rights. Since I have concluded that the Federal Defendants are entitled to qualified immunity because no violation occurred or because the Federal Defendants had a good faith basis for their actions, I dismiss this claim as well.

Plaintiffs' last remaining claim against the Federal Defendants is stated in their Second Claim for Relief and involves an unknown defendant's contact with the media, enticing them to attend the execution of the warrant. The Supreme Court held in Hanlon v. Berger, 119 S. Ct. 1706, 1707 (1999) (per curiam), that the media's attendance at a search in 1993 could not form the basis for constitutional liability because the law regarding such attendance was not clearly established until May 24, 1999, the date of the decisions in Wilson and Hanlon. Consequently, the officers in this case cannot be held liable for a constitutional violation even if Plaintiffs could establish that one or more of them invited the media to film the search.

Accordingly, IT IS HEREBY ORDERED:

The Federal Defendants' motion to dismiss for failure to state a claim, or, in the alternative, for summary judgment is GRANTED (dkt # 6).

IT IS FURTHER ORDERED that the case against ATF Agent Jeff Groh and John Does 26-50 is DISMISSED with prejudice. The clerk is directed to enter by separate document Judgment in favor of the Federal Defendants and against Plaintiffs in accordance with this order. Each party shall bear its own costs.

The clerk shall notify the parties of the entry of this order and of the entry of judgment in this case.

Dated this 14th day of October, 1999.

/s/ Donald W. Molloy
Donald W. Molloy
United States District Judge

United States District Court
District of Montana

In the Matter of the Search of Joseph Ramirez Moose Creek/Techinna Ranch West Frontage Rd. Divide, Montana	SEARCH WARRANT CASE NUMBER: CR-97-009-GF-RMH

TO: Special Agent Jeff Groh and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Jeff Groh who has reason to believe that X on the person of or X on the premises known as

> Moose Creek Ranch, Techinna Apostolic Fellowship located off the west frontage road, north of the Moose Creek exit off of Interstate 15 approximately one half to three quarters of a mile.

in the District of Montana there is now concealed a certain person or property, namely

> A single dwelling residence two story in height which is blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before March 13, 1997 (not to exceed 10 days) the person or place

named above for the person or property specified, serving this warrant and making the search (in the daytime – 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to undersigned as required by law.

March 3, 1997 at 12:12 P.M.	at Great Falls, Mt.
Date and Time Issued	City and State
U.S. Magistrate Robert Holter	/s/ Robert Holter
Name & Title of Judicial Officer	Signature of Judicial Officer

United States District Court
District of Montana

In the Matter of the Search of Joseph Ramirez Moose Creek/Techinna Ranch West Frontage Rd. Divide, Montana	APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT CASE NUMBER: CR-97-009-GF-RMH

I Special Agent Jeff Groh being duly sworn depose and say:

I am a(n) Special Agent with the Bureau of ATF and have reason to believe that X on the person of or X on the premises known as (name, description and/or location)

A single dwelling residence two story in height, blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction and the residence is located approximately one half mile north of the Moose Creek exit off of Interstate 15 on the west side of the west frontage road. Photograph attached.

In the District of Montana there is now concealed a certain person or property, namely (name, description and/or location)

any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.

Which is (give alleged grounds for search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure)

See attachment.

In violation of Title 18 & 26 United States Code, Section(s) 922(o) & 5861

The facts to support the issuance of a Search Warrant are as follows:

See attachment.

Continued on the attached sheet and made a part hereof.

X Yes ☐ No

/s/ Jeff Groh
Signature of Affiant

Sworn to before me, and subscribed in my presence

March 3, 1997 at Great Falls, Mt.
Date City and State

U.S. Magistrate Robert Holter /s/ Robert Holter
Name & Title of Judicial Officer Signature of Judicial Officer

Attachment A

My name is Jeff Groh and I am a Special Agent with the Bureau of Alcohol, Tobacco and Firearms. I have been employed by the Bureau for approximately seven and one-half years and have been stationed in Helena, Montana, since September of 1989. Prior to being employed with the Bureau, I was a Corporal with the DuPage County Sheriff's Police in the Chicago, Illinois, area for approximately four and one-half years. In my capacity as an AFT Agent, part of my duties include investigating the illegal possession of explosive devices by individuals. Since 1995 your affiant has been aware of an individual by the name of Joseph Ramirez who resides in Silver Bow County with his wife and children. The name of the ranch on which Joseph Ramirez and his family reside has been known to be called the Moose Creek Ranch and the Techinnah Fellowship. Your affiant has been made aware of the following facts.

A contractor working on an addition at the Ramirez residence in late 1995 and early 1996 contacted authorities and stated that he has heard automatic weapons fire coming from the area of the Ramirez residence on numerous occasions. The contractor also stated that he has seen AK-47-type firearms in the Ramirez residence and that they are located in upstairs bedrooms. The AK-47 may be easily converted from semi-automatic to fully automatic. The contractor further stated that he has observed what appeared to him to be MAC-10- or MAC-11-type firearms along with shoulder holsters for the firearms. These items were observed in an upstairs bedroom. Next to this bedroom is a bedroom with "a lot of ammunition in all calibers" stacked on shelves which are attached to the walls of the bedroom.

The contractor went on to say that in the living area on the first floor is a coffee table constructed of wood with a display-type glass case as the table top. Inside the glass-cased table this contractor observed a hand grenade and several handguns. The contractor stated that Joseph Ramirez speaks openly about his

possession of firearms. The contractor has observed all of the Ramirez family members, including juveniles, carrying firearms around their house and around the property. The contractor further stated that as part of the addition to the residence is an approximately three-foot storage area under Joseph Ramirez's bedroom on the first floor. The contractor said he did not have any idea what the storage area could be used for, as it is a most unusual space in that it is only three feet in height.

Your affiant investigated these allegations and learned that automatic weapons fire had been heard in the area of the Ramirez residence, had been learned from neighbor's. Your affiant was also able to establish the fact that Ramirez has an acquaintance who legally possess a number of automatic weapons and has on prior occasions fired the automatic weapons while at the Ramirez residence. In fact Ramirez has stated that he also has fired those weapons owned by this individual.

In May of 1996 your affiant was contacted by Joseph Ramirez and questioned as to whether or not ATF was investigating him and his family. Your affiant advised Ramirez that there were allegations of automatic weapons fire and possible explosives violations at his residence. Ramirez stated that he had a right to possess firearms and that he has a right to protect his property. Your affiant advised Ramirez that he could possess any legal firearms and requested a meeting with Ramirez. Your affiant advised Ramirez that he could possess any legal firearm. Ramirez then agreed to a meeting with your affiant. The property is approximately 25 minutes south of Butte, Montana, in the Moose Creek area south of Divide and north of Melrose.

Your affiant, along with Det. Jerry Stradinger of the Butte Sheriff's Office, met with Ramirez at his residence. Ramirez advised your affiant that he was non-violent and considered the right to possess firearms at his residence was his constitutional right. Your affiant spoke with Joseph for approximately 20

minutes and was allowed to look in the upstairs section of the residence. Your affiant observed a bedroom which appeared to be used for a reloading of ammunition room. The room contained reloading presses and the components for reloading ammunition. Also observed were two shelves containing numerous rounds of ammunition which were stacked on the shelves. In an adjoining room a Norinco MAK-90 was observed which had a folding stock. I observed the firearm which did not appear to be altered to fire fully automatic.

We then went back down to the living quarters where your affiant observed a wooden glass case coffee table. Your affiant observed a knife, a .45 caliber pistol, and some other items inside the glass case. Your affiant then spoke with Ramirez about the legalities of possessing fully automatic firearms and explosive devices. Your affiant did not observe any types of hand grenades or other explosives. It should be noted that your affiant did not enter any closet areas or other rooms in the residence prior to departing. Ramirez also has a storage space located under his bedroom which was not searched.

On February 12, 1997, your affiant was contacted by Undersheriff Joe Lee of the Butte-Silver Bow Law Enforcement Agency reference Joseph Ramirez. Undersheriff Lee advised your affiant that he had received further allegations about Joseph Ramirez and an allegation of illegal explosive possession. Undersheriff Lee stated that he had been contacted by a concerned citizen who had been a friend of Ramirez since the spring of 1996 and had moved away from Montana in early October of 1996. The concerned citizen stated that he had become friends with the Ramirez family and had visited with Ramirez with some regularity at least three or four times a week.

The concerned citizen stated that he had observed the Ramirez children at the Moose Creek ranch carrying semi-automatic firearms around the ranch. The concerned citizen stated to

Undersheriff Lee that he has observed an AK-47 and a military-type grenade launcher in the Ramirez residence. The concerned citizen was chided by the Ramirez family for not wanting any part of these firearms or explosives as he does not like firearms and did not want to be around them.

Your affiant then contacted the concerned citizen on or about February 26, 1997, via telephone and spoke with him reference his observations. The citizen stated that he had spent approximately two years in the U.S. Marines and is aware of military ordinance and its capabilities. He stated that he had observed a homemade wooden box with rope handles in the closet in a downstairs bedroom. The bedroom is located to the east of the family room which contained the glass cased coffee table. Ramirez apparently was moving some boxes from this bedroom into his bedroom and requested the assistance of the citizen. It should be noted that Joseph Ramirez's son Joshua and a ranch hand by the name of Paul Bence were also present in the room.

As boxes were moved out of the closet, the citizen noticed this wooden box which contained approximately 24 grenades which are to be launched from a military grenade launcher. These grenades are commonly referred to as "bloopers." The citizen then observed the grenade launcher and some sort of a rocket launcher in the same closet. The rocket launcher would be utilized for a surface-to-air strike capability.

The citizen stated that Ramirez and the other occupants of the room appeared to have forgotten that the grenades were in the closet when they requested his assistance. The citizen asked Joseph why he needed the grenades, but neither Joseph or anyone in the room answered. The citizen stated that the feeling in the room became quite tense, and he again questioned Ramirez as why he needed grenades. Ramirez again did not reply and simply removed the launchers and the grenades from the closet area and placed them in his (Joseph's) room. None of

the other individuals in the room commented on the items, and the topic was not discussed again. The citizen felt that Ramirez had possessed these types of weapons for some time lending reason to the fact they let the citizen into the area.

The citizen said he became concerned about the incident and spoke to his wife about the explosives he had observed. He further stated that following the incident Ramirez attempted unsuccessfully to gain more of the citizen's confidence in order to prevent the citizen from contacting authorities. Ramirez finally advised the citizen that he was tired of the citizen questioning him about his beliefs and the activity at the Ranch. After this conversation with Ramirez, the citizen never returned to the Ranch.

The citizen said he did not tell authorities about the incident as he did not feel it was his place to do so. It was not until January that he spoke to an acquaintance of Ramirez. She told him that one of the women residing at the Ranch had moved farther away from the Ramirez residence and that the "situation" at the Ranch was "deteriorating." The citizen then stated that he felt compelled to contact authorities to at least determine if those items were still in Ramirez's possession. The citizen saw a faxed copy showing the same type of grenades your affiant believed were observed in the bedroom. The citizen identified the 40mm, M-397-type grenade as being the same type of grenades he observed in the residence.

Your affiant checked the reliability of the concerned citizen and found that he does has had prior misdemeanor arrests in Minnesota, California, and Washington State, the last of which was in 1989. The citizen stated that his reason for leaving the area was not because of his relationship with Ramirez, but that he wanted to live in a more suitable climate because of his family and his employment.

Det. Stradinger and Undersheriff Lee contacted another individual reference Ramirez and his alleged possession of illegal weapons. This individual said he believes Ramierz is paranoid of authorities. The individual had, for some time, been aware of a rocket launcher being possessed by Ramirez at the Ranch, although he had never seen it.

Your affiant contacted the NFA branch of ATF in an effort to determine if any explosives devices were registered to Joseph Ramirez or his wife Judy in the National Firearms registration records with negative results. Unless the devices are registered with the NFA Branch neither Joseph or his wife may lawfully possess automatic weapons or hand grenades.

For the reasons listed above, your affiant respectfully requests a search warrant be issued for the Ramirez residence, any outbuildings, and any vehicles registered to Ramirez which are located on the curtilage of the property. The items your affiant will be searching for will be evidence of violations of 18 U.S.C. 922(o) or Title 26 U.S.C. 5861 which may include:

> automatic firearms, grenades or any other types of explosive devices, to include grenades or grenade launchers, rocket launchers, and any and all receipts or paperwork from firearms or explosive device purchases.

/s/ Jeff Groh
Jeff Groh
Special Agent

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-5011

October 11, 2002

Hon. Theodore B. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Re: Jeff Groh v. Joseph R. Ramirez, et al.
Application No. 02A307

Dear Mr. Olson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 11, 2002, extended the time to and including November 22, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/ Clayton R. Higgins, Jr.

Clayton R. Higgins, Jr.
Assistant Clerk

No. 02-811

Supreme Court U.S.
FILED
JAN 27 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEFF GROH, Special Agent with the Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when the law enforcement officer leads a search of a home pursuant to a warrant that does not describe the place to be searched or the items to be seized and all supporting documents are sealed by the issuing magistrate and unavailable for inspection by the home owner?

Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant that erroneously describes the place to be searched as an entire ranch and the items to be seized as a house, and the application and affidavit are not attached to the warrant and are sealed by the Court?

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CONSTITUTIONAL PROVISIONS

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INTRODUCTION

Petitioner has requested a writ of *certiorai* to review the judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit.

Petitioner grossly mischaracterizes the facts of this case in an effort to mislead this Court and create an issue where there is none. There was no application or affidavit attached to the warrant in this case. The only documentation that was presented to Mrs. Ramirez at the time that the agents from the United States Bureau of Alcohol, Tobacco, and Firearms and Butte-Silverbow Sheriff's Department raided the Ramirez home and ranch property was the search warrant. The warrant was facially invalid in that it stated there was concealed on the ranch a two story blue house. No reasonable officer could have believed this to be a valid warrant. Based upon that warrant, Petitioner and his entourage spent several hours conducting a general search of Respondents' home, ranch buildings, and vehicles.

Petitioner attempts to create an issue where none exists by attempting to make this case out to be one in which the affidavit was attached to the warrant that failed to describe with particularity the items to be seized. This is simply not the case. The application and affidavit that Petitioner relies on in this case were placed under seal by the Court and unavailable to Respondents or their attorney. Respondents were denied their constitutional right to be free from unreasonable searches and seizures. The search was unreasonable because it was based upon a warrant that failed to describe with particularity the place to be searched and the items to be seized. Respondents could not even challenge probable cause because the

application and affidavit were placed under seal. Even when the Court finally unsealed the documents, the Court ordered that Respondents could not contact any of the witnesses to ascertain if Petitioner had lied in the application.

The Ninth Circuit correctly found that Petitioner, as the leader of the search team has a duty to make sure he has a valid warrant before invading the sanctity of a private home. The warrant in this case was facially invalid because it completely failed to describe with particularity the items to be seized. There is nothing new or novel about requiring that a law enforcement officer make sure that the warrant meets the particularity requirement. The fact that a warrant is issued by a magistrate does not excuse independent inquiry into its validity by the officers executing it. A warrant, like the one in this case, "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon,* 468 U.S. 897, 923 (1984) Petitioner cannot claim that he is being held accountable for failing to "predict the future course of constitutional law." *Procunier v. Navarette,* 434 U.S. 555 (1978) The particularity requirement has been in existence since the adoption of the Fourth Amendment. This Court determined in 1984 in *Leon* that if a warrant fails to particularize the place to be searched or the items to be seized, the executing officer cannot reasonably presume it to be valid. Petitioner is precluded from establishing qualified immunity by *Leon*, the case that first established the "Good Faith Exception" because this Court in *Leon* specifically recognized that it is not reasonable for an officer executing a warrant to rely upon it if it fails to

describe the items to be seized. Petitioner is simply being held accountable for violating a specific textual mandate of the Fourth Amendment, something that every law enforcement officer has had to honor since 1791. His qualified immunity defense must fail because this Court clearly articulated in 1984 in *Leon* that an officer cannot reasonably presume a warrant is valid if it fails to particularize the place to be searched or the items to be seized.

Petitioner's reliance on the "cure by affidavit" cases is misplaced because there was no attached affidavit served with the warrant. The application and affidavit were under court seal. This is not a case where an affidavit containing particularized descriptions of the place to be searched and the items to be seized was served along with a warrant that, in the absence of an affidavit and/or application, would be defective. The facially defective warrant was not even shown to Mrs. Ramirez until the search was concluded several hours after the rummaging of her home began.

Petitioner violated clearly established law. As stated above, the particularity requirement is spelled out in the text of the Fourth Amendment. No officer since this Court's 1984 decision in *Leon* can claim "good faith" or "reasonable reliance" when executing a warrant that does not meet the particularity requirement. Petitioner plainly acted incompetently in conducting this search. He carelessly typed the warrant and got Magistrate Holter to issue it. Petitioner carefully protected his alleged witnesses by getting the file sealed.

REASONS FOR DENYING THE WRIT

Petitioner is attempting to create issues where none exist. The decision of the Ninth Circuit was based on binding authority from this Court and ten years of Ninth Circuit precedent. Petitioner violated clearly established law by invading the sanctity of Respondents' home pursuant to a facially invalid warrant that did not describe with particularity the items to be seized. This Court established in *Leon* in 1984 that no officer could reasonably rely upon such a warrant.

Similarly, Petitioner attempts to confuse the issue by attempting to place this case in the same category as those in which deficiencies of a warrant were cured by attachments to that warrant. Nothing was attached to the warrant in this case.

I. THE NINTH CIRCUIT CORRECTLY HELD THAT PETITIONER VIOLATED CLEARLY ESTABLISHED LAW AND COULD NOT HAVE REASONABLY RELIED ON THE WARRANT

Petitioner conducted a general search of Respondents' ranch and home. The plain language of the Fourth Amendment provides several means of attacking the validity of a search warrant. The Fourth Amendment states: " . . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Thus there are four requirements for a warrant to be valid. Any one missing element will render it invalid. The warrant in this case was invalid because it did not describe either the place to be searched nor the items to be seized. The Court need look no further

than the text of the Fourth Amendment to decide this case. The warrant served after the search of the Ramirez home and ranch was one, two-sided sheet of paper. No description of the items sought by Petitioner during the several hour general search was written within the four corners of that document.

Petitioner's claim of qualified immunity must fail because such a claim is inconsistent with this Court's decision in *U.S. v. Leon*, 468 U.S. 897 (1984). The warrant in this case is exactly like that described in *Leon*. It was " . . . so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon*, 468 U.S. 897, 923 (1984).

Petitioner, like any other law enforcement officer, should have known about this Court's decision in *Leon* by March 4, 1997. Additionally, any law enforcement officer in the Ninth Circuit should have known there was no exception to the particularity requirement via an affidavit unless that affidavit was attached to and referenced by the warrant. *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997) is controlling in that circuit. Although *McGrew* was decided six months after the raid in this case, the Court recognized the long-standing rule in the Ninth Circuit, stating:

> The well settled law of this circuit states that a "search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein." *Hillyard*, 677 F.2d at 1340; see also *United States v. Van*

> *Damme*, 48 F.3d 461, 466 (9th Cir. 1995) (invalidating warrant on these grounds); *United States v. Towne*, 997 F.2d 537, 544-47 (9th Cir. 1993) (reaffirming rule and discussing other cases doing same); *Spilatro*, 800 F.2d at 967 (holding that affidavit could not cure overbroad search warrant because it was not attached to it).

McGrew, at 849. The violation of the innocent Respondents' constitutional right to be free from unreasonable search and seizure is apparent. The warrant was invalid. It did not describe the place to be searched or the items to be seized with particularity or at all. No affidavit was attached to and/or referenced in the warrant. Construing the warrant in the light most favorable to the Petitioner would only allow him and his cohorts to search the ranch for a two story blue house that is visible from Interstate 15.

The Ninth Circuit recognized that there are circumstances in which a warrant that fails the particularity requirement may be validated by the affidavit in support of the warrant. If the affidavit is served with the warrant and the warrant refers to the affidavit, the affidavit may be incorporated by reference. Otherwise it is invalid and the executing officers cannot claim "good faith."

> Although dicta in Towne, supra, suggested that the good faith exception might be available when the agent who drafted the affidavit is present at the search or when the agents confine their search to the scope of the affidavit, Kow subsequently squarely held that such facts, even if true, cannot establish good faith. See Kow, 58 F.3d at 428-30. The agents must either serve the affidavit with the warrant or list with particularity its relevant directives on the warrant itself.

> Otherwise, the good faith exception is not available because (1) the requirement of attaching affidavits to general warrants has been the clear law of this circuit for over a decade, foreclosing any "reasonable belief" to the contrary; and (2) no matter how aware the officers are of the limits of their search, the person being searched (the second aim of the rule) is still completely unaided when agents fail to produce a document explaining the parameters of the search.

McGrew, at 850. Petitioner violated clearly established law of the Ninth Circuit and is not entitled to qualified immunity.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE IS CONSISTENT WITH THIS COURT'S DECISION IN *LEON* AND DISTINGUISHABLE FROM CASES FROM OTHER CIRCUITS

As stated above, this Court recognized in *Leon* that a warrant could be so facially defective that the executing officers could not reasonably believe it to be valid. In this case anyone who would have read the warrant should have known it was invalid. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) did not specifically address the "cure by affidavit" rule that has been adopted by the lower courts although a more detailed affidavit accompanied the defective warrant. However, this Court did observe that "if the judge had crossed out the reference to controlled substances, and written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid." *Id.* at 990 n. 7. This statement by this Court is the precursor to the "cure by affidavit" rule adopted by the Ninth Circuit and others. The cases cited in *McGrew* established well before 1997

the rule that in order for an affidavit to be used to support an otherwise overbroad warrant, the affidavit must be referenced in and attached or accompany the warrant while the search is being executed.

Petitioner attempts to create an issue where none exists. This is not a case where an affidavit was attached to a facially invalid warrant. Thus any case that Petitioner cites for the proposition that an attached affidavit cures a defective warrant provides no support to his case. In fact none of the cases cited by Petitioner are on point.

The Fifth Circuit cases are factually different from this case. The Fifth Circuit in *United States v. Cherna*, 184 F.3d 403, 412 (5th Cir. 1999), *cert. denied*, 529 U.S. 1065 (2000) recognized that it was not a case where non-attachment of the affidavit made the warrant so obviously defective that the officers could not reasonably have relied on it. The Court stated, "First, Attachment B, expressly mentioned in the warrant and attached thereto, referred to Smitherman's affidavit and described in considerable detail twenty-six categories of evidence to be seized." *Id.* In *United States v. Beaumont*, 972 F.2d 553 (5th Cir. 1992) the affidavit of the applicant accompanied the facially defective warrant. In *Beaumont*, the detailed affidavit was attached and in *Cherna* there was a detailed attachment that also referenced the detailed affidavit. Both are significantly more particular than a warrant that claims that there is a two story blue house concealed on a ranch! Even the warrant in *United States v. Shugart*, 117 F.3d 838 (5th Cir. 1997) came closer than the warrant here. The agents in *Shugart* seized evidence related to methcathinone production based on a warrant that "contained boilerplate

provisions obviously intended for use in cases involving possession with intent to distribute narcotics." *Id.* at 844.

The Eighth Circuit cases are no help to Petitioner's case. In *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990) the Court stated that the "well-established rule" in that circuit was "that the affidavit must both accompany the warrant and be incorporated into it." *Id.* at 77 n. 4. The Court noted that these requirements were not met, However, "the application and affidavit were in actuality a single three-page document, entitled 'Application for Search Warrant and Supporting Affidavit.' . . . this document was attached to the warrant, which was labeled as page four. The issuing magistrate signed both the warrant and the application/affidavit form." Petitioner's Application and Affidavit in this case were not attached, and in fact were allegedly under seal, at the court. Despite the "seal" the Petitioner was able to produce the face page subsequent to the search. The Petitioner was also allowed to supplement his application with an additional affidavit. *United States v. Thomas*, 263 F.3d 805 (8th Cir. 2001) was similar to *Curry*, a case where no address was on the warrant. The warrant in *Thomas* contained the wrong address for the house to be searched. In *Thomas*, the correct house was under surveillance at the time the officer went to get the warrant.

The warrant in *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) mistakenly described the items to be seized as concealed upon the person, but subsequently described the premises to be searched. Thus the warrant itself provided the officer and the homeowner a description of the place to be searched and the items to be seized. The Court adopted a standard of "practical accuracy rather than technical precision." The Tenth Circuit used this

standard again in *United States v. Ortega-Jimenez*, 232 F.3d 1325 (10th Cir. 2000). In that case the Court interpreted the term "present and arriving" in the warrant to include persons that had left the scene prior to the receipt of the warrant. Here again the storage unit was under surveillance at the time an officer went to get a search warrant. The defendant had already left the storage unit prior to the officers obtaining the warrant, but arrived and left while the officers were watching the unit waiting for a fellow officer to return with a warrant. The Court relied upon the unattached affidavit to clarify with "practical accuracy" the meaning of the term "present and arriving" to include the defendants that came to the unit while it was under surveillance and an officer was applying for the warrant. These cases are factually dissimilar to the present case that authorized a search for a two story blue house.

Finally, the Third Circuit supported the position of the Ninth in *Bartholomew v. Pennsylvania*, 221 F.3d 425 (3d Cir. 2000). Qualified immunity was granted because it was not the clear law of that Circuit at the time that a lack of particularity in a search warrant cannot be cured by reference to underlying affidavits that have been placed under seal. This is not the case in the Ninth Circuit. The Ninth Circuit specifically acknowledged in *McGrew* that good faith would not apply in these circumstances because the "cure by affidavit" rule in that circuit that required incorporation and accompaniment was well established "for more than a decade".

CONCLUSION

The petition is without merit. It wrongfully claims the affidavit was attached to the warrant when it was served. The Petitioner's search of the Rameriz house was unlawful. Such a search has been unlawful since *Leon* in 1984. The Ninth Circuit clearly followed the precedent established in the Circuit for more than a decade, that a defective warrant cannot be cured by an affidavit not served with the warrant. There is no good faith immunity defense available to the Petitioner. The petition should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 02-811

FEB 11 2003

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

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REPLY BRIEF FOR PETITIONER

This case cleanly presents a constitutional issue on which the circuit courts are divided and on which the Ninth Circuit has departed from the Court's precedents. The constitutional issue here is whether law-enforcement officers who properly obtain a warrant will be held to a constitutional violation, outside the bounds of the "good faith" doctrine, when the warrant is insufficiently particular and the supporting documentation is not presented when the warrant is executed. In addition, the Ninth Circuit has continued its repeated pattern of stubbornly ignoring the Court's teachings about how to resolve issues of qualified immunity – an area where this Court has tried in the past to exert control over the Ninth Circuit's waywardness by means of summary reversals, *per curiam* rulings, and decisions on the merits. Aside from rearguing the facts,[1] respondents barely address these points; to the extent they seek to deny any conflict among the lower courts, their discussion is incomplete and unpersuasive. For these reasons, as amplified below, either summary reversal or plenary review is warranted here.

I. THE PARTICULARITY ISSUES UNDER THE FOURTH AMENDMENT HERE ARE CLEANLY PRESENTED AND WARRANT REVIEW.

The circuit courts of appeals are divided on the specific constitutional issue that underlies the defense of qualified immunity raised in this case: whether law enforcement officers violate the particularity requirement of the Fourth Amendment and leave themselves outside the bounds of the "good faith"

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[1] Respondents claim that petitioner "grossly mischaracterizes the facts of this case." Opp. 1. This claim is made without citation, and no actual misstatement of fact is ever quoted. Respondents assert repeatedly that there was "no application or affidavit attached to the warrant in this case," *id.*; *see also id.* at 3, 4, 8, which is only half-true. No affidavit was attached to the warrant when it was served – and petitioner has never claimed otherwise – but an affidavit was attached to the warrant when it was submitted to and approved by the magistrate. The district court placed those documents under seal, and the relevant portions were transmitted to respondents immediately when their attorneys requested them. *See* Pet. 3-4.

doctrine when they execute a warrant that was approved by a court based on an attached application and affidavit that are sufficiently particular, but where the warrant itself does not contain the same level of detail.

Respondents make a passing effort to dispel any circuit conflict, *see* Opp. 8-10, but their account of the lower court decisions is inadequate and incomplete. Their breezy claim that all of the other cases involved warrants that were "cured" by affidavit, *see id.* at 7-8, is demonstrably mistaken. At bottom, they seek to distinguish other circuit cases on irrelevant factual grounds that do not bear on the pertinent constitutional issues, such as the fact that the search in those cases did not involve "a two story blue house," unlike this one. *See id.* at 6, 8, 10.

For example, in discussing the Eighth Circuit's approach, respondents recount certain facts, but never explain how those facts are supposed to distinguish those cases from this one. In fact, both *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990), and *United States v. Thomas*, 263 F.3d 805, 808-09 (8th Cir. 2001), *cert. denied*, 534 U.S. 1146 (2002), are squarely in conflict with the decision below. In *Curry*, the officer made a clerical error that caused the warrant to omit any address or description of the place to be searched whatsoever. As in this case, the warrant was therefore defective on its face for lack of particularity, even though the information contained in the original affidavit was correct. As in this case, the affidavit was not referenced in the warrant, and so did not provide a basis for curing the particularity defect under the Fourth Amendment. *See Curry*, 911 F.2d at 76-77. Indeed, the upshot was that in *Curry*, as in this case, the magnitude of the error which the officer had made – which caused the warrant to contain *no address* at all – was such that the officer arguably could not be said to have acted "in objectively reasonable reliance on a subsequently invalidated warrant." *United States v. Leon*, 468 U.S. 897, 922 (1984). Nonetheless, the Eighth Circuit allowed the affidavit that had been submitted with the original warrant application to be used to demonstrate the good faith of the officers and upheld the search under *Leon*. In that instance, the court stressed that the application and affidavit both contained

the correct address; there was no evidence of bad faith on the part of the officers; the search was executed by the affiant; and the responsibility for the error should lie not with the officers but with the judge who issued the warrant. *See Curry*, 911 F.2d at 76-77. Each factor is established in this case as well, yet the Ninth Circuit reached the opposite decision on the constitutional issue. Respondents fail to dispel this direct conflict.

Moreover, in *Thomas* the Eighth Circuit recently reaffirmed its position on the good faith doctrine. There the warrant did not omit any address whatsoever; instead, it contained an incorrect address. Again, the underlying affidavit contained the correct information; the error was made by the officer who applied for the warrant; the affidavit did not accompany the warrant and was not referenced in it, and thus could not be used to cure the defect in particularity. In language that is directly applicable to the facts of this case, the court reached the same holding as before, reaffirming that "although no officer could have reasonably believed the warrant in *Curry* described the premises to be searched, the court upheld the search on the *Leon* objective good faith rule." *Thomas*, 263 F.3d at 808.

Indeed, in the *Thomas* case Judge Kyle dissented, adopting the same position that grounded the Ninth Circuit's holding in this case. He opined that the majority's approach would have the effect of "reading the particularity requirement out of the Fourth Amendment" because the officer had been the source of the clerical error and, had the officer "read the warrant *at any time* before [executing it,] the warrant's defect would have been obvious to him." *Id.* at 811. He thus could not see how the case could "fit within the *Leon* 'good faith' exception." *Id.* His argument was the precise basis for the ruling below in this case, and yet it was explicitly rejected by the Eighth Circuit. *See* Pet. App. 5a-7a & n.2. The circuit conflict is undeniable.

In the same vein, the Tenth Circuit also limits the "cure by affidavit" rule to those cases where the affidavit is specifically incorporated in or physically attached to a warrant. *See United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993). In later cases, however, the Tenth Circuit has applied the "good

faith" doctrine to uphold the validity of searches where an affidavit not incorporated in or attached to a warrant is used to supply the lack of particularity, at least where the same officer both produced the affidavit and executed the warrant. *See United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998). In *Simpson*, indeed, the Tenth Circuit stated its holding as follows: "While his affidavit was not physically attached to the warrant nor specifically incorporated into the warrant, and thus cannot cure a lack of particularity, . . . the affidavit certainly supports the district court's conclusion that [the officer] in good faith believed he was obtaining a warrant to search [defendant's] residence as well as his person." *Id.* (citation omitted). Under this rule, of course, the Ninth Circuit must have reached the opposite result in this case. Yet respondents' sol comment is the lame observation that these cases are "factually dissimilar to the present case that authorized a search for a two story blue house." Opp. 10.

Respondents do suggest possible distinctions for some, but not all, of the case law from the Fifth Circuit. In *United States v. Cherna*, 184 F.3d 403 (1999), *cert. denied*, 529 U.S. 1065 (2000), the court's holding was diametrically opposed to the Ninth Circuit's approach, which it expressly disavowed. *See id.* at 413 (disapproving the Ninth Circuit's holding that if the "'affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents'") (quoting *United States v. McGrew*, 122 F.3d 847, 850 (1997)). It is true that the warrant in *Cherna* contained attachments, though the underlying affidavit was not attached, and this distinction does not take the case outside the pertinent rule.

Moreover, in *United States v. Shugart*, 117 F.3d 838 (5th Cir.), *cert. denied*, 522 U.S. 976 (1997), the search warrant was challenged because it authorized a search for evidence of drug possession rather than evidence of drug manufacturing. The court held that it lacked particularity and that this defect could not be cured by referring to the underlying affidavit on which it was based, which was not incorporated in the warrant. *See id.* at 844. It nonetheless went on to consider the affidavit in upholding the search based on *Leon*'s good faith doctrine,

concluding that the case was controlled by this Court's holding in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the companion case to *Leon*. *See Shugart*, 117 F.3d at 845-46. That decision stands in direct conflict with the ruling below in this case.[2]

Finally, respondents do not dispute that the Third Circuit has joined the Ninth Circuit in resolving the underlying constitutional issue. In explicit reliance on *McGrew*, the Third Circuit has held that a lack of particularity in a search warrant cannot be cured by reference to underlying affidavits that have been placed under seal with the Court, without regard to the good faith doctrine. *See Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (3d Cir. 2000). In those circumstances, the court held, the warrant itself must contain a specific description of the items to be seized to avoid a violation of the Fourth Amendment, though it parted company with the Ninth Circuit on the qualified immunity issue. *See id.* at 429-30. Thus it cannot be said that the ruling below represents just an isolated or insubstantial conflict among the circuits.

Another important consideration here is that the approach taken by the Third and Ninth Circuits cannot be squared with the Court's precedents on the good faith doctrine in *Leon* and in *Sheppard*, which was the companion case to *Leon*. In *Sheppard*, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Sheppard* was that a warrant to search for controlled substances was insufficiently particular when the accompanying affidavit indicated that the affiant actually wished to search for evidence relating to a homicide investigation. It was undisputed that the issuing judge and the executing officers knew the contents of the affidavit and the focus of the search;

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[2] In *United States v. Beaumont*, 972 F.2d 553 (5th Cir. 1992), the affidavit was attached to the warrant, but the court held that the particularity requirement was not met and the good faith doctrine was invoked to uphold the validity of the search. The fact that the affidavit was attached to the warrant did not play a meaningful role in the Fifth Circuit's analysis, which again turned on the controlling precedent in *Sheppard*. *See id.* at 560-61.

indeed, the affiant had pointed out the discrepancy to the judge, who nonetheless approved the issuance of the warrant. *See Sheppard*, 468 U.S. at 985-86. On these facts, this Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable, despite its acknowledged defects, because if the warrant had simply referenced the affidavit, it would have been clearly valid. *See id.* at 989-990 & n.7. The same is true in these circuit-court cases. Indeed, it is notable that *none* of the pertinent decisions from the Third or Ninth Circuits – *McGrew*, *Bartholomew*, and the ruling below – *ever discusses or even mentions* this Court's *Sheppard* decision. Their refusal to address this Court's controlling precedent is itself sufficient to justify either plenary review or summary reversal here. *See* S. Ct. R. 10(c).

There is also no doubt that the constitutional issue here is important. Many thousands of search warrants are obtained and executed throughout the country each day. Mistakes frequently occur, and when they do this Court has indicated that prior approval by a magistrate in the vast majority of instances should operate to validate the subsequent search where the officers have acted in good faith. At stake is the suppression of evidence in criminal trials and the immunity of law-enforcement officers in civil cases such as this one. Yet these conflicting decisions will prove dispositive on the same claims when they are brought in courts in different parts of the country, and the legal guidance available to such officials will remain murky and uncertain without the Court's intervention. In particular, the ruling below requires officers to second-guess judges who have approved warrants, upon pain of incurring personal liability for monetary damages and losing valuable evidence in criminal trials. That regime sharply undercuts the "good faith" doctrine that this Court established in the *Leon* and *Sheppard* decisions.

As a procedural matter, it bears repeating that the Fourth Amendment issue is cleanly presented here. In qualified immunity cases such as this, the constitutional issue would be decided first and may obviate any need to reach the qualified immunity issue at all. *See, e.g., Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (resolving qualified immunity case by deciding

only constitutional due process issue); *County of Sacramento v. Lewis*, 523 U.S. at 833, 839-55 (1998) (same); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (resolving Fourth Amendment issue against officers but proceeding on to uphold their defense of qualified immunity). If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented here on the underlying Fourth Amendment issue.

II. THE RULING BELOW DISREGARDS SETTLED PRINCIPLES OF QUALIFIED IMMUNITY AND DEPARTS FROM COURT PRECEDENT.

The Ninth Circuit, once again, has refused to apply the doctrine of qualified immunity that the Court has extended to federal and state officials. The Court has consistently held that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court has defined the issue, "clearly established" law means that some controlling authority from the Supreme Court or the relevant lower court of last resort has already addressed the specific legal issue at stake. *See, e.g., Wilson*, 526 U.S. at 617.

Rather than define the legal test in this manner, the Ninth Circuit blurred the issue here by stating that "[l]aw enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances." Pet. App. 7a. By thus misstating the proper test – and by failing to address the *Sheppard* case, which is the most prominent Court precedent to the contrary – the court below gave itself broad leeway to find petitioner liable simply for failing to "predict the future course of constitutional law," an approach that this Court has denounced. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

This fundamental error is revealed in several different ways. Most obviously, the Ninth Circuit relied on its *McGrew* decision, which did not even issue until September 12, 1997 –

more than six months after the underlying events in this case had occurred on March 7, 1997. *See* Pet. App. 9a. At the time petitioner acted, the *only* judicial decision on point in the Ninth Circuit was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's criminal conviction. *See McGrew*, 122 F.3d at 848-49. Moreover, the line of Ninth Circuit decisions later cited in *McGrew* was quite tenuous on the constitutional issue. In both *United States v. Towne*, 997 F.2d 537, 549-550 & n.6 (9th Cir. 1993), and *United States v. Luk*, 859 F.2d 667, 676-77 & n.10 (9th Cir. 1988), the court had opened the door wide to application of the good faith doctrine in cases where search warrants were found to be insufficiently particular but underlying affidavits contained more information. Even *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), which respondents cite as having settled the issue, plainly failed to do so: in a footnote toward the end of that opinion, the court referred to its prior discussion in *Luk*, which suggested that "the failure to have a limiting affidavit present at the time of a search would not necessarily preclude a finding of good faith reliance." *See id.* at 430 n.4 (citing *Luk*, 859 F.2d at 677 n.10). All the Ninth Circuit said in *Kow*, however, was that this suggestion "may" not be "an accurate reflection of the current status of our law," and in the end the panel concluded that on the facts of the *Kow* case "we need not resolve any question regarding the application of the *Luk* footnote." *Id.* That hardly amounts to "clearly established" law.

In addition, in the ruling below the Ninth Circuit coined an entirely new doctrine of liability for law-enforcement officers in Fourth Amendment cases. Picking out "the leaders of the search team" for special responsibility, the court held that such leaders "must actually read the warrant and satisfy themselves that . . . it is not defective in some obvious way." Pet. App. 8a. *No prior case* had ever rendered such a holding. Indeed, the two prior Ninth Circuit cases cited for this proposition (*see id.* at 8a-9a) had held exactly to the contrary: (i) in *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986), the court held that officers executing a warrant must "inquire as to the nature and

scope of the warrant," but stressed that "it was not necessary for all or even any of [them] to actually see the warrant," *id.* at 1375; and (ii) in *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), the court noted that it had not found "any authority" supporting such a duty, and explicitly reversed the trial court's conclusion that "clearly established law imposed a duty on the officers, who had generally fulfilled their duty to become informed as to the scope of the warrant, to read or refer to the signed warrant." *Id.* at 1029-30. It would be especially perverse, therefore, to deny a defense of qualified immunity in a case such as this one, where the Ninth Circuit decided to make new law that departed from its own settled precedents.

Indeed, a close examination of the ruling below and the cases cited in the papers filed with this Court here reveals that at the time petitioner acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that his actions were unlawful. Only the later decisions by the Ninth Circuit in *McGrew* and in this case, and by the Third Circuit in *Bartholomew* (excepting its holding on qualified immunity), are now to the contrary. In this posture, the Ninth Circuit could not legitimately invalidate the defense of qualified immunity unless it ignored the legal framework that this Court has erected for evaluating such claims. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson*, 526 U.S. at 617. Once again, officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In this case, moreover, the merits of the underlying Fourth Amendment issues are not obvious, even today, to many judges who are vested with the authority to address them. *See supra* Part I.

Summary reversal is therefore warranted in this case to reaffirm that the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). And exerting such control is even more important where, as here, this particular lower court has so frequently departed from the Court's

precedents in this area. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (summary reversal of Ninth Circuit decision misapplying law on qualified immunity); *see also Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (*per curiam* reversal of Ninth Circuit ruling to restore qualified immunity for law-enforcement officers); *Saucier*, 533 U.S. at 201 (reversing Ninth Circuit holding that erroneously denied qualified immunity); *cf. Lewis*, 523 U.S. 833 (1998) (reversing on substantive constitutional grounds Ninth Circuit holding that erroneously denied qualified immunity); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (reversing on procedural grounds Ninth Circuit holding that erroneously denied qualified immunity). Further review of the ruling below, by one mechanism or another, is plainly justified here.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed or, in the alternative, the petition for a writ of *certiorari* be granted to review the merits of the Fourth Amendment and qualified immunity issues.

Respectfully submitted,

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Attorney for Petitioner

February 2003

(5)

Supreme Court, U.S.
FILED
MAY 19 2003
OFFICE OF THE CLERK

No. 02-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 22, 2002
CERTIORARI GRANTED MARCH 3, 2003

50 PP

JOINT APPENDIX
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Application and Affidavit for Search Warrant
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Letter from William K. Suter, Clerk of the Court
to Hon. Theodore B. Olson
(Oct. 11, 2002) ..... Pet. App. 36a

U.S. District Court
U.S. District Court of Montana (Butte)

CIVIL DOCKET FOR CASE #: 99-CV-17

Ramirez, et al v.
Butte-Silver Bow Cty, et al — Filed: 03/04/99
Assigned to:
Judge Sam E. Haddon — Jury demand: Plaintiff
Demand: $0,000 — Nature of Suit: 440
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

3/4/99	1	COMPLAINT and JURY DEMAND (crm) [Entry date 03/08/99]
5/3/99	2	ANSWER by defendant John McPherson to [1-1] (crm) [Entry date 05/04/99]
5/3/99	3	ANSWER by defendant Joe Lee to [1-1] (crm) [Entry date 05/04/99]
5/21/99	4	PRELIMINARY Pre-trial Conference Order by Judge Donald W. Molloy PPT Statement due: 8/26/99 PreDiscovery Disclosure Stmt due: 7/15/99 ; Preliminary Pretrial Conf set for 2:30 9/2/99 (baw) [Entry date 05/24/99]
6/14/99	5	STATEMENT of uncontroverted facts by defendant Jeff Groh (baw) [Entry date 06/17/99]
6/14/99	6	MOTION by defendant Jeff Groh to dismiss, or in the alternative, for summary judgment (baw) [Entry date 06/17/99]

6/14/99	7	MEMORANDUM/BRIEF by defendant Jeff Groh in support of motion to dismiss [6-1], of motion for summary judgment [6-2] (baw) [Entry date 06/17/99]
6/28/99	8	MOTION by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez to extend time to 7/22/99 to file pla respm re [6-1], which is Fed deft's mtn to dismiss or in the alternative for sumjgm (crm)
6/29/99	9	ORDER by Judge Donald W. Molloy granting motion to extend time to 7/22/99 to file pla respm re [6-1], which is Fed deft's mtn to dismiss or in the alternative for sumjgm [8-1] and Fed Dfts are granted an extension of time to and including 8/13/99 to file any reply. (cc: all counsel) (mcn) [Entry date 06/30/99]
7/14/99	13	PREDISCOVERY DISCLOSURE STATEMENT by defendant Jeff Groh (baw) [Entry date 07/19/99]
7/15/99	10	PREDISCOVERY DISCLOSURE STATEMENT by defendant John McPherson (cpy on disk) (crm) [Entry date 07/16/99]
7/15/99	11	PREDISCOVERY DISCLOSURE STATEMENT by defendant Joe Lee (cpy on disk) (crm) [Entry date 07/16/99]
7/16/99	12	PREDISCOVERY DISCLOSURE STATEMENT by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff

		Joshua Ramirez, plaintiff Regina Ramirez (crm)
7/23/99	14	RESPONSE by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez to motion to dismiss [6-1], to motion for summary judgment [6-2] (crm)
7/23/99	15	STATEMENT OF MATERIAL ISSUES OF FACT by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez in re [6-1], in re [6-2] (crm)
8/9/99	16	PRELIMINARY PRETRIAL STATEMENT by plaintiffs (san) [Entry date 08/11/99]
8/13/99	17	REPLY by defendant Jeff Groh to response to motion to dismiss [6-1], motion for summary judgment [6-2] file delivered to: Judge Molloy (crm) [Entry date 08/16/99]
8/16/99	18	PRELIMINARY Pre-trial Conference Order by Judge Donald W. Molloy; Preliminary Pretrial Conf Reset for 1:30 9/29/99; all other conditions set forth in the Court's order of 5/18/99 are still in effect (baw)
8/18/99	19	ORDER by Judge Donald W. Molloy regarding [6-1], regarding [6-2]; in-court hearing/oral argument set for 1:00 9/9/99 with pptc to follow. (cc: all counsel) (mcn) [Entry date 08/19/99]
8/20/99	20	ORDER by Judge Donald W. Molloy Preliminary Pretrial Conference set

following the in-court hearing set for 1:00 9/29/99 (cc: all counsel) (baw)

8/24/99 21 PRELIMINARY PRETRIAL STATEMENT by defendant John McPherson, defendant Joe Lee (with cpy on diskette) (crm) [Entry date 08/25/99]

8/24/99 22 PRELIMINARY PRETRIAL STATEMENT by defendant Butte-Silver Bow Cty (with cpy on diskette) (crm) [Entry date 08/25/99]

8/24/99 23 PREDISCOVERY DISCLOSURE STATEMENT by defendant Butte-Silver Bow Cty (with cpy on diskette) (crm) [Entry date 08/25/99]

8/24/99 24 ANSWER by defendant Butte-Silver Bow Cty complaint [1-1], (with cpy on diskette) (crm) [Entry date 08/25/99]

8/25/99 25 PRELIMINARY PRETRIAL STATEMENT by defendant Jeff Groh (mcn)

9/29/99 26 MINUTES: In-court hearing held 9/29/99; W.G. Gilbert and Vince Kozakiewicz for plf.; Deanne Sandholm for deft.; motion to dismiss or for summary judgment argued by Deanne Sandholm 1st; 1:35pm-Vince Kozakiewicz argues; 2:12pm-Deanne Sandholm responds; 2:17pm-recess for 10 minutes before PPTC in jury room before Judge Donald W. Molloy C/R: Daina Hodges (baw)

10/5/99 27 ATTORNEY APPEARANCE for plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez by W.G. Gilbert III (crm)

10/13/99 28 ORDER by Judge Donald W. Molloy; pretrial order ddl set for 10/25/00; Preliminary Pretrial Conference held on 9/29/99; final pretrial conference set for 11:00 11/1/00 in MSO; jury trial set for 1:00 11/13/00 in Butte; discovery ddl 6/2/00; motions ddl 7/5/00; discl of deft. damages experts-4/1/00; discl. of plf. damages experts 3/1/00 (cc: all counsel) (baw) [Entry date 10/15/99]

10/19/99 29 ORDER by Judge Donald W. Molloy granting motion to dismiss [6-1], granting motion for summary judgment [6-2] dismissing party Jeff Groh and does 26-50 with prejudice each party to bear its own costs. (cc: all counsel) (mcn) [Entry date 10/20/99]

10/20/99 30 JUDGMENT: in favor of the federal defendants and against the plaintiffs, each party to bear its own costs by Judge Donald W. Molloy (cc: all counsel) (mcn)

11/19/99 31 NOTICE OF APPEAL by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez from Dist. Court decision [30-1] Fee Status/Amount $105.00 paid Receipt # 21797 (cc: all counsel) (crm) [Entry date 11/23/99]

12/6/99	32	TIME SCHEDULE ORDER from USCA. Appellant's brief: 03/06/99 Appellee's brief: 04/05/99 Appellant's reply: 04/20/99 (crm)
2/29/00	33	MANDATE Spread from Circuit Court of Appeals dismissing without prejudice the appeal [31-1] (crm)
4/11/00	34	MOTION by defendant John McPherson, defendant Joe Lee, defendant Butte-Silver Bow Cty for summary judgment. Red file to Melissa (crm) [Entry date 04/12/00] [Edit date 04/14/00]
4/11/00	35	MEMORANDUM/BRIEF by defendant John McPherson, defendant Joe Lee, defendant Butte-Silver Bow Cty in support of motion for summary judgment [34-1] (crm) [Entry date 04/12/00]
4/11/00	36	STATEMENT OF UNCONTROVERTED FACTS by defendant John McPherson, defendant Joe Lee, defendant Butte-Silver Bow Cty in support of [34-1] (crm) [Entry date 04/12/00]
5/17/00	37	RESPONSE by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez to motion for summary judgment [34-1] (crm)
5/17/00	38	STATEMENT OF SUPPLEMENTAL UNCONTROVERTED FACTS by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez in re [34-1], which is deft mtn for sumjgm (crm)

5/17/00	39	LETTER of explanation of late filing of [37-1] and [38-1] from W.G. Gilbert, III for plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez (crm)
5/23/00	40	REPLY by defendant Butte-Silver Bow Cty, defendant John McPherson, defendant Joe Lee to response to motion for summary judgment [34-1] file delivered to: DWM (crm) [Entry date 05/24/00]
9/27/00	41	ORDER by Judge Donald W. Molloy granting motion for summary judgment [34-1] dismissing party Butte-Silver Bow Cty, party John McPherson, party Joe Lee, and dismissing case (cc: all counsel). (lll) [Entry date 09/28/00]
9/27/00	42	JUDGMENT: by Judge Donald W. Molloy regarding [41-3], finding in favor of Butte-Silver Bow County, Sheriff McPherson and Undersheriff Lee and against Plaintiffs, each party to bear its own costs (J/O Book Vol 38, Pg 52) (cc: all counsel). (lll) [Entry date 09/28/00] [Edit date 10/02/00]
10/30/00	43	REPRESENTATION STATEMENT identifying all parties to the action along with names addresses and telephone numbers of their respective counsel if any Ramirez, plaintiff Joshua Ramirez, plaintiff Julia L. Ramirez, plaintiff Joseph R. Ramirez (crm) [Entry date 11/01/00]
10/30/00	44	NOTICE OF APPEAL by plaintiff Regina Ramirez, plaintiff Joshua Ramirez, plaintiff Julia L. Ramirez, plaintiff Joseph R.

Ramirez from Dist. Court decision [29-2], [30-1], [41-3], [42-1] Fee Status/Amount 105.00 paid Receipt # 29075 (cc: all counsel) (crm) [Entry date 11/01/00]

11/13/00 45 CERTIFIED COPY of Appellate Court Order: Appellants' notice of reinstatement is construed as a motion for reinstatement. So construed, the motion is granted. This appeal is reinstated. The briefing schedule is as follows: the opening brief and excerpts of record are due December 14, 2000, the answering brief is due January 16, 2001, and the optional reply brief is due 14 days from service of the answering brief (cc: all counsel) (crm) [Entry date 11/14/00] [Edit date 11/14/00]

11/14/00 46 TIME SCHEDULE ORDER from USCA. Appellant's brief: 02/15/01 Appellee's brief: 03/19/01 Appellant's reply: 04/02/01 (crm) [Entry date 11/15/00]

11/6/01 47 ATTORNEY SUBSTITUTION: terminating Deanne L. Sandholm and substituting attorney William W. Mercer (cc: USCA - Records Unit - 95 Seventh St - San Francisco CA 94103) (crm) [Entry date 11/07/01] [Edit date 11/07/01]

4/9/02 48 MANDATE Spread from Circuit Court of Appeals affirming in part and reversing in part decision of the District Court Appeal [44-1] (crm) [Entry date 04/10/02]

4/26/02 49 CERTIFIED COPY of Appellate Court Order: The mandate, having been issued prematurely, is hereby recalled (crm)

8/5/02 50 MANDATE Spread from Circuit Court of Appeals affirming in part and reversing in part decision of the District Court Appeal [31-1], [44-1] (crm) [Entry date 08/06/02]

10/28/02 51 ATTORNEY SUBSTITUTION: terminating attorney William W. Mercer for Jeff Groh and substituting attorney Timothy J. Cavan (crm) [Entry date 10/30/02]

10/30/02 53 ORDER by Judge Donald W. Molloy Case reassigned to Judge Carolyn S. Ostby (cc: all counsel) (crm) [Entry date 11/04/02]

10/31/02 52 ANSWER by defendant Jeff Groh complaint [1-1] (crm) [Entry date 11/01/02]

11/27/02 54 ORDER by Judge Donald W. Molloy regarding obj to USMJ, [0-1] Case reassigned to Judge Sam E. Haddon for all trial proceedings and entry of jgmt. (cc: all counsel) (ljm) [Entry date 12/02/02]

12/5/02 55 MAIL Returned [54-1], [54-2] addressed to plaintiff Regina Ramirez, plaintiff Joshua Ramirez, plaintiff Julia L. Ramirez, plaintiff Joseph R. Ramirez by cnsl Vincent Kozakiewicz; remailed to address on label from USPO-4535 S Five Mile Rd, Boise, ID 83709-4862 (rew) [Entry date 12/05/02]

12/17/02 56 ORDER by Judge Sam E. Haddon; status hearing set for 1:00 2/7/03 in Butte (cc: all counsel and C/C Butte) (ljm)

1/22/03 57 ORDER by Judge Sam E. Haddon; Status hearing set for 2/7/03 in VACATED and

RESET for status hearing on 2:00 2/28/03 in BUTTE MT ((fax to Clk/BU) cc all counsel) (lav)

3/13/03 58 ORDER by Judge Sam E. Haddon, U.S. Supreme Court granted Deft's Petition for Certiori on 3/3/03. Parties shall report to Court at least each 3 months on status of Supreme Court Appeal. First report filed no later than 5/12/03 (cc: all counsel) (ljm)

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 00-35955 Filed 11/8/00
Nsuit: 3440 Other civil rights (Fed)
Ramirez, et al v. Butte-Silver Bow Cty, et al
Appeal from: District of Montana (Butte)

11/8/00 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellants' designation of RT is due 11/9/00; appellee's designation of RT is due 11/20/00; appellant shall order transcript by 11/29/00; court reporter shall file transcript in DC by 1/2/01; certificate of record shall be filed by 1/8/01; appellants' opening brief is due 2/15/01; appellees' brief is due 3/19/01; appellants' optional reply brief is due 14 days from service of the answering brief. [00-35955] (hh) [00-35955]

11/8/00 Filed Vincent J. Kozakiewicz for Appellants Regina Ramirez, et al., Civil Appeals Docketing Statement; served on 10/30/00 (to CONFATT) [00-35955] [00-35955] (hh) [00-35955]

12/18/00 Filed motion and deputy clerk order PROMO: (Deputy Clerk: cag) Aplts' motion to consolidate is GRANTED. Nos 99-36138 and 00-35955 shall proceed as consolidated appeals. The briefing schedule in no. 00-35955 shall govern both appeals. Court records do not currently reflect that the dc has issued the COR in nos. 99-36138 and 00-35955. Aplts shall monitor the

issuance of the certificate. (Motion recvd 12/12/00) [99-36138, 00-35955] (hh) [00-35955 99-36138]

12/27/00 Case rejected from Circuit Mediation Program. (sa)
[00-16505 99-16647 00-16714 00-16728 00-16914 00-16917 00-16937 00-16997 00-17034 00-17071 00-17112 00-17138 00-17146 00-17194 00-17203 00-17220 00-17234 00-17260 00-17274 00-17324 00-17341 00-17394 00-35814 00-35905 00-35916 00-35918 00-35924 00-35926 00-35955 00-35961 00-35989 00-35990 00-36010 00-36014 00-56466 00-56558 00-56561 00-56574 00-56581 00-56601 00-56666 00-56681 00-56715 00-56725 00-56735 00-56745 00-56754 00-56807 00-56912 00-56921 00-56929 00-56933 00-56953 00-57000 00-57050 00-57059 00-71138 00-71398]

2/16/01 Filed original and 15 copies Appellant Joseph R. Ramirez, Julia L. Ramirez, Joshua Ramirez, Regina Ramirez opening brief (Informal: n) 37 pages; 5 excerpts of record in 1 vol.; served on 2/13/01 (minor defcy: covers do not have consolidated case number) Notified counsel. [00-35955, 99-36138] (gar) [00-35955 99-36138]

3/5/01 Received Appellants Joseph R. Ramirez, et al., satisfaction of (minor) brief deficiency (corrected covers for brfs and excs). (RECORDS) [99-36138, 00-35955] (hh) [00-35955 99-36138]

3/12/01 Filed notice of joint brief of Appellees Jeff Groh, et al., Briefing schedule is now as follows: appellees' brief due 4/9/01; optional reply brief is due 14 days from service of the aples' brief. Five additional pages or 1,400 words are authorized for aplee(s) only. (CASEFILE) [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/10/01 Filed original and 15 copies appellee Jeff Groh, Butte-Silver Bow Cty 47 pages brief, 0 Exc. vols:; served on 4/9/01 [99-36138, 00-35955] (crw) [00-35955 99-36138]

4/27/01 Filed original and 15 copies aplts Joseph R. Ramirez, et al., reply brief, (Informal: n) 16 pages; served on 4/23/01 [99-36138, 00-35955] (hh) [00-35955 99-36138]

6/13/01 Calendar check performed [99-36138, 00-35955] (rei) [00-35955 99-36138]

6/21/01 Calendar materials being prepared. [99-36138, 00-35955] (rei) [00-35955 99-36138]

7/9/01 CALENDARED: Seattle Sep. 10, 2001 1:30 PM Courtroom Park Place; 21st Floor ** session to start at 9:30 am ** [99-36138, 00-35955] (rei) [00-35955 99-36138]

9/10/01 Notice of Appearance for Appellees by William W. Mercer [99-36138, 00-35955] (ss) [00-35955 99-36138]

9/10/01 ARGUED TO Alex KOZINSKI, Ronald W. GOULD, William W. Schwarzer;

SUBMISSION DEFERRED. [99-36138, 00-35955] (ss) [00-35955 99-36138]

9/13/01 Received from Bredon J. Rohan in 99-36138 and 00-35955 letter dated 9/13/01 re: parties jointly agreeing additional time is necessary for settlement discussions; respectfully requesting until 9/28/01 for submission of case for decision. [99-36138, 00-35955] (ss) [00-35955 99-36138]

3/13/02 Filed order (Alex KOZINSKI, Ronald M. GOULD, William W. Schwarzer): This case is submitted for decision. [99-36138, 00-35955] (hh) [00-35955 99-36138]

3/13/02 Case deemed submitted on this date to Alex KOZINSKI, Ronald M. GOULD, William W. Schwarzer. (See previous deferral of submission.) Order filed: 3/13/02. [99-36138, 00-35955] (hh) [00-35955 99-36138]

3/13/02 FILED OPINION: AFFIRMED IN PART and REVERSED IN PART. No costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Alex KOZINSKI, author; Ronald M. GOULD; William W. Schwarzer.) FILED AND ENTERED JUDGMENT. [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/4/02 MANDATE ISSUED [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/22/02 Filed order (Deputy Clerk: hh) The mandate, having been issued prematurely, is

hereby RECALLED. [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/22/02 Filed appellee Jeff Groh's motion for a 14-day ext of time within which to file a petion for rehearing and rehearing en banc (to 5/13/02); declaration of Victoria L. Francis; served on 4/19/02 [4414903] (to AUTHOR) (hh) [00-35955 99-36138]

4/30/02 Filed order (Alex KOZINKSI): Aples' motion for ext of time to file a petition for rehearing and rehearing en banc until 5/13/02, is GRANTED. [99-36138, 00-35955] (hh) [00-35955 99-36138]

5/13/02 [4430536] Filed original and 50 copies Appellee Jeff Groh, Butte-Silver Bow Cty petition for rehearing with suggestion for rehearing en banc 13 pages, served on 5/13/02 PANEL & ALL ACTIVE JUDGES [99-36138, 00-35955] (ru) [00-35955 99-36138]

5/20/02 Filed order (Alex KOZINSKI): Aplts are ordered to file a response to the petition for rehearing. The response is not to exceed 15 pages, and must be filed no later than 21 days from the date of this order. [99-36138, 00-35955] (hh) [00-35955 99-36138]

6/10/02 Filed Appellants opposition to federal appellee petition for en banc rehearing, served on 6/7/02 (PANEL & ALL ACTIVE JUDGES) [99-36138, 00-35955] (ru) [00-35955 99-36138]

7/25/02	Filed order and amended opinion (Judges Alex KOZINSKI, Ronald M. GOULD, William W. Schwarzer) (Orig. opinion id: [4383878-1] in 99-36138, [4383878-1] in 00-35955) The opinion filed 3/13/02, is amended as follows: ...(see opinion). With these amendments, the petition for rehearing is DENIED and the petition for rehearing en banc is REJECTED. AFFIRMED IN PART AND REVERSED IN PART. No costs. [99-36138, 00-35955] (hh) [00-35955 99-36138]
8/2/02	MANDATE ISSUED [99-36138, 00-35955] (hh) [00-35955 99-36138]
10/23/02	Received letter from the Supreme Court dated 10/11/02 re: The application for an ex.tm within which to file a petition for a writ of certiorari in the above entitled case has been presented to Justice O'Connor, who on 10/11/02, extended the time to and including 11/22/02. (Casefile) [99-36138, 00-35955] (gva) [00-35955 99-36138]
12/6/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-811 filed on 11/22/02. (CASEFILE) [99-36138, 00-35955] (ru) [00-35955 99-36138]
3/7/03	Received notice from Supreme Court, petition for certiorari GRANTED on March 3, 2003. Supreme Court No. 02-811 (CASEFILE) (ru) [00-35955 99-36138]

VINCENT J. KOZAKIEWICZ
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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ, Plaintiffs, -v- COUNTY OF BUTTE-SILVER BOW, JOHN MCPHERSON, SHERIFF OF BUTTE-SILVER BOW COUNTY, JOE LEE, UNDERSHERIFF OF BUTTE-SILVER BOW COUNTY, JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, and JOHN DOES 1-50, named in their individual and/or official capacities, Defendants.	) No.) CV-99-17-) BU-DWM)))) COM-) PLAINT))))))))))))

For their complaint against defendants, Plaintiffs allege:

1. This is an action for damages brought pursuant to Title 42 U.S. Code § 1983 for violations of certain protections

guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the federal Constitution, and related state common law claims, by the defendants under color of law in their capacity as Sheriff, John McPherson, Undersheriff, Joe Lee, and as officers and deputies of the Butte-Silver Bow Sheriff's Department or Police Department, John Does 1-25.

2. Plaintiffs bring this action against Jeff Groh, a federal special agent for the Bureau of Alcohol, Tobacco and Firearms and John Does 26-50, federal agents with the Bureau of Alcohol, Tobacco and Firearms, pursuant to Title 28 U.S. Code § 1331, in claims arising from violations of federal constitutional rights guaranteed in the First, Fourth, Fifth, Ninth and Fourteenth amendments to the U.S. Constitution and redressable pursuant to *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

PARTIES

3. Plaintiffs, Joseph, Julia, a/k/a Judy, Joshua and Regina Ramirez are residents of Butte-Silver Bow County, Montana residing in the family home on the Techinnah Ranch.

4. Plaintiffs are members of the Techinnah Apostolic Ministries, an unincorporated church association and as part of its ministry, provides shelter for abused or widowed women and fatherless children of the faith.

5. Defendant, Butte-Silver Bow County is a political subdivision of the State of Montana.

6. Defendant, John McPherson is and was at the times referred to below, the elected Sheriff of Butte-Silver Bow County and policy maker for the County regarding law enforcement.

7. Defendant, Joe Lee is and was at all times referred to below the duly appointed Undersheriff of Butte-Silver Bow County.

8. Defendants, John Does 1-25 were at all times referred to below duly appointed policemen or Sheriff's Deputies of Butte-Silver Bow County. Their names will be added by amendment after Defendants identify them in discovery.

9. Defendant Jeff Groh is and was at the times referred to below a special agent with the United States Bureau of Alcohol, Tobacco and Firearms.

10. Defendants, John Does 26-50 were at all times referred to below agents of the United States Government. Their names will be added by amendment after Defendants identify them in discovery.

11. All Defendants, except Butte-Silver Bow County are named in their individual capacities. The sheriff, undersheriff, and John Does 1-25 are also named as well in their official capacities.

FACTS COMMON TO ALL CLAIMS

12. Plaintiffs are residents of Butte-Silver Bow County, Montana, residing in their home located on the Techinnah Ranch near the Moose Creek exit off Interstate 15 in Butte-Silver Bow County. Joseph Ramirez is the leader of the Techinnah Ministries and disabled in that he has an artificial leg. Mr. Ramirez was in a Seattle, Washington Veteran's Hospital on March 4, 1997, receiving a new artificial leg.

13. On March 4, 1997, Judy Ramirez came out of her bedroom and found Defendant, Jeff Groh and several other unknown defendants in the kitchen of her home. Defendant, Jeff Groh told Judy Ramirez that they were there to search

her home and produced an alleged search warrant. (attached as Exhibit A and incorporated herein by reference)

14. The alleged search warrant was facially invalid in that it stated that a two story residence was concealed on the ranch! The alleged warrant did not authorize a search for or seizure of anything else.

15. Based on the alleged warrant, Defendant Jeff Groh and other unknown defendants, searched through the entire Ramirez residence, opening drawers, drawing diagrams of the interior, recording serial numbers of firearms and making other written or photographic records. Nothing was put back and in the course of the search, items of personal property were broken. Judy Ramirez was not allowed to leave the home and was followed wherever she went in the home. None of the other Defendants made any attempt to prevent the entry into the Ramirez home even though the alleged warrant did not authorize such entry.

16. While several defendants were engaged in the search of the Ramirez family home, Defendant, Joe Lee and several other defendants entered into the Ramirez's motor home and outbuildings on the ranch rummaging through personal items. None of the other Defendants made any attempt to prevent the entry into the Ramirez motor home and outbuildings even though the alleged warrant did not authorize such entry.

17. Defendant, Joe Lee and several other defendants entered the silver barn and told two minor children, Michael and Mary Noyce to stay in the barn and not move. These children were interrogated by the Defendants about the children's life on the ranch. None of the other Defendants made any attempt to prevent the entry into the barn even though the alleged warrant did not authorize such entry.

18. The illegal search of the ranch, Ramirez home, Ramirez motor home and outbuildings lasted several hours. No arrests were made nor any items seized from the property except for pictures, notes and sketches made by the defendants.

19. One or more of the Defendants contacted the news media, prior to the raid on the ranch. The television cameras were on scene at the time the Defendants arrived and a story about the raid appeared on the evening news. The local newspaper also ran a story on the raid.

20. Joseph Ramirez received a letter from his bank, postmarked several days after the raid, stating that he was to make an appointment to come to the bank and close his accounts. He was advised that he must make an appointment and if he showed up unannounced, law enforcement would be called.

21. Butte-Silver Bow authorities are engaged in a pattern and practice of conducting searches in violation of federal and state constitutional mandates.

PRIOR CONTACT WITH DEFENDANTS

22. In May, 1996, defendant, Jeff Groh contacted Joseph Ramirez. He told Mr. Ramirez that he had heard numerous rumors about the Techinnah Ranch and wanted to visit. Mr. Ramirez invited Jeff Groh to come to the ranch. During that visit Mr. and Mrs. Ramirez showed him around the ranch, discussed the ministry and showed Mr. Groh his gun collection. The Ramirez's were led to believe that they had cleared up any rumors and thought the matter was ended.

23. In December of 1996, Mr. Ramirez was asked to come and talk with Butte-Silver Bow authorities and Department of Family Service workers. They allegedly were investigating rumors of child abuse. Mr. Ramirez met, in

Butte with the authorities, answered their questions, explaining how the ranch was run and that he teaches that children should be raised according to biblical principles. He stressed that all persons on the ranch try to live in accordance with biblical principles. Mr. Ramirez referred any other questions to his attorney, Vincent J. Kozakiewicz. Deputy County Attorney, Brad Newman advised that there was no probable cause to go onto the ranch and the Ramirez's again believed the matter was over.

FIRST CLAIM FOR RELIEF

24. Based upon the foregoing, the actions of Defendants, constituted an invasion of Plaintiffs' right to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

25. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

26. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

SECOND CLAIM FOR RELIEF

27. By contacting the news media prior to the raid that falsely accused the Plaintiffs of criminal activity when the

Defendants knew or should have known that the alleged warrant was invalid, violated Plaintiffs' right to due process of law for the news release by Defendants damaged Plaintiffs' credit standing and reputation and put pressure on Plaintiffs to counter the false charges and had a serious effect upon Plaintiffs' public and professional standing and the willingness of businesses to do business with them.

28. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs' pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

29. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

THIRD CLAIM FOR RELIEF

30. Based on the foregoing, Defendants conducted an invasions of Plaintiffs' right to privacy as guaranteed by the Ninth Amendment to the United States Constitution.

31. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

32. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

FOURTH CLAIM FOR RELIEF

33. Based on the foregoing, Defendants conducted an invasion of Plaintiffs' right to privacy as guaranteed by Article II, Section 10 of the Constitution of the State of Montana.

34. For the foregoing reasons, Defendants, John McPherson, Joe Lee and John Does 1-25 are liable to Plaintiffs for compensatory damages in such amounts as the proof may show.

FIFTH CLAIM FOR RELIEF

35. Based upon the foregoing, the actions of Defendants, constituted an invasion of Plaintiffs' right to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, in violation of Article II, Section 11 of the Constitution of the State of Montana.

36. For the foregoing reasons, Defendants, John McPherson, Joe Lee and John Does 1-25 are liable to Plaintiffs for compensatory damages in such amount as the proof may show.

SIXTH CLAIM FOR RELIEF

37. The actions of the Defendants and the resulting publicity has caused Plaintiffs to be viewed with suspicion and has chilled their religious expression and witnessing to others, and thereby deprived Plaintiffs of their rights to free

expression guaranteed by the First Amendment of the United States Constitution.

38. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

39. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

SEVENTH CLAIM FOR RELIEF

40. Defendants have a duty to preserve law and order and provide all classes of persons with protection from constitutional violations by others.

41. Based upon the foregoing facts, Defendants breached the aforementioned duty by failing to intervene while observing other Defendants engaged in the violation of Plaintiffs' constitutional rights.

42. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

43. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

EIGHTH CLAIM FOR RELIEF

44. Based on the foregoing, the individual Defendants acted with malice and oppression as defined by Montana law, for which they are liable to Plaintiffs for exemplary damages pursuant to 42 U.S.C. § 1983, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) and Montana law.

DAMAGES

45. Since the incident on March 4, 1997, Mrs. Ramirez has been afraid to stay in her own home on the ranch. She has difficulty sleeping and becomes afraid whenever an unfamiliar vehicle comes down the road. She is in constant fear that the defendants will be coming any minute to kill her or her family. Joseph Ramirez has had to live with his wife's distress on a daily basis. It is particularly distressing to Plaintiffs that Defendant, Joe Lee informed Joseph Ramirez, nearly two years after the incident, that they could not expect any protection from the Butte-Silver Bow Sheriff's Department.

46. Defendants that were in the Ramirez home broke Mr. Ramirez's glass drafting table.

47. All Plaintiffs are subjected to unwanted stares in public, unwanted publicity, have had disruption to their established course of life, damage to their reputation, and damage to Joseph Ramirez's professional reputation.

48. The events above described caused Plaintiffs great humiliation, embarrassment, and mental and emotional suffering; and will in the future, continue to cause them such humiliation, embarrassment and mental and emotional suffering.

49. The events described above have had a chilling effect on Plaintiffs' expression of their First Amendment rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court enter judgment in their favor for compensatory and exemplary damages, together with their costs and attorneys fees pursuant to 42 U.S.C. § 1988, and their court costs, and award them such other relief as this Court deems proper.

JURY DEMAND

Plaintiffs demand trial by jury

DATED this 4th day of March, 1999.

/s/Vincent J Kozakiewicz
Vincent J. Kozakiewicz
Attorney for Plaintiffs

STATE OF MONTANA)
: ss.
County of Beaverhead)

JOSEPH R. RAMIREZ, being first duly sworn, deposes and says as follows, to-wit:

That he is one of the Plaintiffs named in the foregoing Complaint; that he has read the said Complaint and that the facts and matters contained therein are true, accurate and correct to the best of his knowledge, information and belief.

/s/ Joseph R. Ramirez
JOSEPH R. RAMIREZ

Subscribed and Sworn to before me this 4th day of March, 1999.

/s/ Vincent J. Kozakiewicz
Notary Public for the State of Montana
Residing at Dillon, Montana
My commission Expires Nov. 15, 1999

STATE OF MONTANA)
: ss.
County of Beaverhead)

JULIA L. RAMIREZ, being first duly sworn, deposes and says as follows, to-wit:

That she is one of the Plaintiffs named in the foregoing Complaint; that she has read the said Complaint and that the facts and matters contained therein are true, accurate and correct to the best of her knowledge, information and belief.

/s/ Julia L. Ramirez
JULIA L. RAMIREZ

Subscribed and Sworn to before me this 4th day of March, 1999.

/s/ Vincent J. Kozakiewicz
Notary Public for the State of Montana
Residing at Dillon, Montana
My commission Expires Nov. 15, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA - BUTTE DIVISION

JOSEPH R. RAMIREZ,
JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and
REGINA RAMIREZ,

Plaintiffs,

V

COUNTY OF BUTTE-SILVER BOW, JOHN MCPHERSON, SHERIFF OF BUTTE-SILVER BOW COUNTY, JOE LEE, UNDERSHERIFF OF BUTTE-SILVER BOW COUNTY, JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, and JOHN DOES 1-50, named in their individual and/or official capacities,

Defendants

JUDGMENT IN A CIVIL CASE

CV-99-17-BU-DWM

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_XX_ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that JUDGMENT is entered in favor of the Federal defendants and against Plaintiffs, each party to bear its own costs.

October 20, 1999
Date

LOU ALEKSICH, JR., CLERK

/s/ Mary Nieble
(By) Deputy Clerk

FILED, ENTERED and NOTED CIVIL JUDGMENT BOOK VOLUME 37 PAGE 42

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ	)	
Plaintiffs-Appellants,	)	C.A. 99-36138 C.A. 00-35955
vs.	)	
COUNTY OF BUTTE-SILVER BOW; et al,	)	
Defendants-Appellees,	)	
and	)	
JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO and FIREARMS,	)	
Defendant-Appellee.	)	

JOINT BRIEF OF APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

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UNITED STATES OF AMERICA

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* * *

[all material between the ellipses omitted]

* * *

C. The district court correctly concluded that no violation of the Fourth Amendment occurred.

The district court correctly concluded that no violation of the Fourth Amendment occurred under the undisputed facts of this case. The Fourth Amendment to the United States Constitution secures the right of the people against unreasonable searches and seizures. The Ramirezes allege that the federal search warrant which authorized the search of their residence was "facially invalid" for two reasons. One, there was a typographical error in the description of the residence to be searched and two, that the items to be searched for appeared only on the face of the search warrant application/affidavit, but not on the face of the search warrant itself. See Complaint at ¶¶ 14, 24-29 (ER, Tab 5).

In typing the information onto the face of the search warrant, Agent Groh inadvertently placed part of the description of the residence in the section of the warrant reserved for the description of the property (or persons) believed to be concealed on the premises to be searched. Because of this inadvertent mistake, the face of the search warrant did not describe the property believed to be concealed. This information was clearly delineated on the face of the search warrant application/affidavit and within Agent Groh's five page affidavit to the court. The Ramirezes do not dispute that at the execution of the search warrant Agent Groh twice described the items involved in the search warrant, once to Judy Ramirez and once, by telephone, to Joseph Ramirez. Groh Aff. ¶ 7 (ER Tab 7). Additionally, it is undisputed that Agent Groh told the other participating officers of the objects of the search. Groh Aff. ¶ 6 (ER Tab

7). The Ramirezes do not dispute either their, or the Federal and County Appellees', actual knowledge of the property to be searched for and seized.

In the context of affidavits or applications submitted in support of search warrants, it is a violation of the Fourth Amendment for an affiant to knowingly, or with reckless disregard for the truth, include false statements in the affidavit. Franks v. Delaware, 438 U.S. 154, 155-156 (1978); United States v. Stanert, 762 F.2d 775 (9th Cir. 1985), amended, 769 F.2d 1410 (9th Cir. 1985), cert. denied, 475 U.S. 1026 (1986). To defeat a claim of qualified immunity in a Bivens case, the plaintiffs must make a substantial showing of deliberate falsehood or reckless disregard for the truth, such as required under Franks. See, e.g., Stanert. 762 F.2d at 781-82. The Ramirezes do not argue that the facts as presented in the search warrant affidavit are incorrect, but rather argue that the search warrant itself is "facially invalid" as the residence was inadvertently described as "concealed" property. The district court correctly concluded that this inadvertent error does not rise to the level of the Fourth Amendment violation. There is no showing that Agent Groh's actions were reckless or that the inadvertent error was a "deliberate falsity." More importantly, the mistake on the face of the search warrant was harmless and did not affect the Court's probable cause determination. Indeed, the face of the search warrant application was correctly typed and included a complete description of the place to be searched and the items to be seized. See Application and Affidavit for Search Warrant, (ER Tab 2). Additionally, the affidavit attached to the application, from which the court determined probable cause, set out the specific items to be seized.

The Ramirezes argue that, because on the face of the warrant the place to be searched was listed as the ranch and the item to be seized was listed as a two-story blue house, the officers exceeded the scope of the warrant when they

searched the outbuildings and the vehicles on the property. The district court correctly determined that the search of the outbuildings and/or vehicles was not unreasonable or beyond the scope of the warrant. This determination is in complete accord with controlling authority.

This Court has expressly held that "a search warrant authorizing the search of a residence also authorizes without so stating the search of the residence's curtilage." United States v. Gorman, 104 F.3d 272 (9th Cir. 1996). This Court additionally has indicated that a "curtilage is simply an extension of the residence's living area, and we have previously held that such extensions become a part of the residence for purposes of a search warrant." Gorman, 104 F.3d at 274-275; see also, United States v. Elliott, 893 F.2d 220, 225 (9th Cir. 1990), cert. denied, 498 U.S. 904 (1990) (search of adjacent storeroom was reasonable pursuant to a warrant which only mentioned search of an apartment). Likewise, this Court has also expressly held that searches of vehicles which are contained on the curtilage of the residence to be searched, but not mentioned in the warrant, are implicitly covered under the authority to search the curtilage. United States v. Vaandering, 50 F.3d 698, 701 (9th Cir. 1995).

There is further support for the district court's determination. Here, the five page affidavit to the search warrant application, reviewed by the court in issuing the search warrant, clearly stated that the search was to include the "residence, any outbuildings, and any vehicles registered to Ramirez which are located on the curtilage of the property." See, Affidavit in Support of Search Warrant, page 4 (ER Tab 2). The officers executing the search were all briefed by Agent Groh and had access to the affidavit as well. As such, the Ramirezes' allegations that the officers' actions were unreasonable and in violation of their rights, because the scope of the verbiage as contained only on the face of the search warrant was exceeded, is without merit and fails to

state any constitutional violation under the Fourth Amendment.

Additionally, the Ramirezes' argument that the search warrant itself is invalid since it describes the residence as "concealed" does not state a violation under the Fourth Amendment. While the Fourth Amendment requires that a search warrant particularly describe "the place to be searched, and the person or things to be seized," the test for determining the validity of a warrant is whether the warrant and affiliated documents describe the place to be searched with sufficient particularity to enable the law enforcement officers to locate and identify the premises with reasonable effort, and whether any reasonable probability exists that the officers may mistakenly search another premises. United States v. Turner, 770 F.2d 1508, 1510 (9th Cir. 1985).

In this case, the residence is clearly and accurately described on both the face of the search warrant application/affidavit, as well as within Agent Groh's five page affidavit to the court. Additionally, Agent Groh had been to the Ramirezes' residence before applying for the search warrant. See Complaint at ¶ 22 (ER Tab 5). When Agent Groh presented the search warrant affidavit to the court, he accurately communicated to the judge the description of the place to be searched and the items to be seized. After the warrant was signed, the officers and agents were briefed on the location of the residence and the items which were the objects of the search. They located and searched the correct residence and informed the Ramirezes of the place to be searched and the property to be seized. In similar circumstances, this Court has expressly provided that no Fourth Amendment violation exists. See, Turner, 770 F.2d at 1511 (upholding validity of warrant that described house to be searched with sufficient particularity despite an incorrect address on the face of the warrant).

Finally, the Ramirezes argue that the search warrant itself is invalid because the specific items to be searched for do not appear on the face of the warrant. This Court has stated that "to pass constitutional muster, a warrant 'must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.'" United States v. McGrew, 122 F.3d 847, 849 (9th Cir. 1997) (citing United States v. Sollotro, 800 F.2d 959, 963 (9th Cir. 1986)).[1] The purpose of the warrant is not only to "limit the officer's discretion," but also to "inform the person subject to the search what items the officers executing the warrant can seize." See United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir. 1986),[2] cert. denied, 479 U.S. 1086 (1987) rehearing denied, 481 U.S. 1043 (1987).

In this instance, the face of the search warrant did not include the items that appellees were authorized to seize. However, these items were orally described to the Ramirezes, and were provided through the face page of the Application and Affidavit for Search Warrant. Groh Aff. ¶¶ 7, 9 (ER Tab 7). Therefore, the issue is whether or not the purpose of the warrant requirement was met in this instance by the oral and written communication of the correct information to both the agents executing the warrant as well as the Ramirezes.

The district court correctly concluded that no constitutional violation occurred in this case. Order at 8-11 (ER Tab 9). Although the Ramirezes were able to point to

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[1] See also United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995), United States v. Robertson, 833 F.2d 777, 783 (9th Cir. 1987), United States v. Hotal, 143 F.3d 1223, 1226 (9th Cir. 1998).

[2] See also United States v. Van Damme, 48 F.3d 461, 466 (9th Cir. 1995), see also United States v. Gantt, 194 F.3d 987 (9th Cir. 1999) (failure to show particularized warrant to plaintiff prior to search failed to give her notice as to what could be seized), see also United States v. Choi, 1999 U.S. App. LEXIS 10664, 5 (9th Cir. 1999) (Agents required to leave warrant with plaintiff, warrant includes anything Agents relied upon during their search.).

errors on the face of the warrant, there was no dispute that, at the time of the execution of the search warrant, (1) participating officers were aware of the premises to be searched and the objects of the search, and (2) the Ramirezes were aware of the premises to be searched and the objects of the search. Therefore, the purpose of the particularity requirement was met in this case.

The purpose of the particularity requirement is to make general searches impossible. United States v. Towne, 997 F.2d 537, 548 (9th Cir. 1993) (quoting United States v. Holzman, 871 F.2d 1496, 1508 (9th Cir. 1989)). When the magistrate issuing the warrant is apprised of the scope of the search and can make the determination that probable cause is established, when the officers are aware of the items to be seized, and when the person being searched has notice of the items to be seized, the risk of a general search is eliminated. United States v. Towne, 997 F.2d at 548.

When a warrant "fails to offer sufficiently detailed instruction and instead leaves [the officers conducting the search] guessing as to their task," the warrant is facially deficient. United States v. Towne, 997 F.2d at 549.[3] However, this defect may be cured by proof that the affiant himself was present at the execution of the warrant. See United States v. Luk, 859 F.2d 667, 677 (9th Cir. 1988). This defect may also be cured by evidence that specific information was relied upon by the magistrate and the officers who signed the warrant. United States v. Towne,

[3] The Ninth Circuit has revisited the issue of the good faith exception since Towne. In Van Damme, the court stated that "[t]he warrant need not necessarily describe the things to be seized, if the application for it does, and the officers executing the warrant have the application with them," since then the officers can refer to it and show it to the person to be searched. See United States v. Van Damme, 48 F.3d 461, 466 (9th Cir. 1995).

997 F.2d at 550 n.6.[4] In Luk, the Ninth Circuit considered, as evidence of the officers' good faith, their reliance on an affidavit where the affiant was present and supervising the search, even though the affidavit was not expressly incorporated into the warrant by reference and may not have been in the hands of the executing officers during the search. Luk, 859 F.2d at 677 & n.10; see also, Towne, 997 F.2d at 550 n.6. Here, just as in Luk, the affiant, Agent Groh, was present and directed the search for items specified with particularity in the search warrant application/affidavit.

Urging reversal on the grounds that the district court erred in concluding that no Fourth Amendment violation occurred, the Ramirezes rely heavily on United States v. McGrew, 122 F.3d 847. Appellants' Brief at 10-18. In McGrew, this Court reiterated the proposition that search warrants must be sufficiently particular in order to safeguard "the right to be free from unbounded, general searches" and that they lack sufficient particularity when they fail to specify the items to be seized. Id., at 849 (citation omitted); see United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995); United States v. Robertson, 833 F.2d 777, 783 (9th Cir. 1987); United States v. Hotal, 143 F.3d 1223, 1226 (9th Cir. 1998).

While the Ninth Circuit has distinguished the Luk/Towne analysis in two recent cases, McGrew[5] and United States v. Kow, these cases are distinguishable. First, in Kow, the Court rejected the defendants' good faith reliance on a facially invalid warrant, noting that the description of the items to be searched was "too broad." Kow, 58 F.3d at 429-

[4] However, the presence of an affiant will not cure an overbroad affidavit since his presence and reliance on an overbroad affidavit will not cure the specificity problem. See United States v. Kow, 58 F.3d 423, 429 (9th Cir. 1995), see also Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 750 (9th Cir. ____).

[5] The search of the ranch occurred on March 4, 1997, prior to the McGrew decision. McGrew was decided on August 8, 1997 and filed September 12, 1997. McGrew, 122 F.3d at 847.

430. However, in holding that the defendants could not in good faith rely on the underlying affidavit, the court first noted that "unlike the facts in Luk, there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the warrant, actually relied on the information in the affidavit to limit the warrant's overbreadth." Kow, 58 F.3d at 429. Therefore, the test is whether or not there was "the level of guidance necessary to cure a facially invalid warrant." Kow, 58 F.3d at 429-430 (emphasis added).

In McGrew, the government contended that the generalized warrant was cured by a more particularized and incorporated affidavit, but refused to provide a copy of the affidavit delineating the items to be seized at any time prior to trial, and contended that they had no obligation to do so. McGrew, 122 F.3d at 849. Ultimately, the Ninth Circuit first held that the warrant could not be cured by an affidavit which was not provided or attached with the search warrant. McGrew, 122 F.3d at 849-850. Secondly, the Ninth Circuit held that the "good faith" exception to the exclusionary rule was not available to the defendants because there was not an "objective reasonable basis for the mistaken belief that the warrant was valid." McGrew, 122 F.3d at 850 (internal citation omitted). Additionally, as the Ramirezes point out, McGrew rejected Towne, which would allow the good-faith exception when the agent was present, because (1) the affidavit was not "attached" to the warrant, and (2) the person being searched was unaware of the limits of the search. However, in McGrew the government intentionally withheld the particularized affidavit, even up to and during the suspect's criminal prosecution. McGrew, 122 F.3d at 849. That was not the case here. Agent Groh provided the detailed list of items to be seized upon request.

As the district court correctly determined, both McGrew and Kow are distinguishable under the facts of this case. In McGrew, there was no indication that the officers involved in

the search provided the residents of the searched home any description of the items to be seized before, during or after the search. In McGrew, the warrant referred to the affidavit's list of items to be seized, but the affidavit did not accompany the warrant and, even after the search, the officers refused to reveal any portion of the affidavit to the home's owners. In Kow, the description of the items to be seized in the warrant as well as the application were overbroad and the application, therefore could not cure the warrant's deficiencies. United States v. Kow, 58 F.3d at 429-30. As the district court noted:

> The Ninth Circuit panel deciding McGrew was faced with a police force that stubbornly insisted the persons whose home was searched had no interest in independently ascertaining the particular description of the place to be searched or items to be seized. Hence, McGrew emphasized:
>
> > The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer's discretion and to inform the person subject to the search what items the officers executing the warrant can seize. . . . Because the agents never served a copy of the affidavit on McGrew, the second goal was entirely unsatisfied here. Neither, in all likelihood, was the first; this court has held expressly that "neither purpose is served" when the affidavit fails to accompany the warrant.
>
> McGrew, 122 F.3d at 850 (quoting United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir. 1986).
>
> Likewise, in United States v. Kow, 58 F.3d 423 (9th Cir. 1995), the description of items to be seized in both the warrant and the application were overbroad. Id. at 429-430. Thus, the application could not cure the warrant's overbreadth.

Order at pp 9-10 (ER Tab 9).

By contrast in the present case, the purposes of the particularity requirement, i.e., to limit the officer's discretion as to what can be seized and to inform the person subject to the search what items can be seized, were met. The Ramirezes did not contest the fact that they were orally informed of the items to be seized and that the face page of the Application and Affidavit for Search Warrant was immediately faxed to their counsel, showing the correct description of items to be seized. The officers executing the search warrant were informed of the items to be seized. The purposes of the particularity requirement were met without the need for the affidavit, so there was no requirement that the affidavit accompany the warrant. See, e.g., United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982) (holding that search warrant may be construed with reference to application if application accompanies warrant and warrant incorporates application but not requiring application to accompany warrant in all cases).

Legally, the decisions of Kow and McGrew are distinguishable from the present case. In these cases plaintiffs were attempting to use the exclusionary rule to exclude evidence and defendants were opposing exclusion under the good-faith exception. These were evidence battles, not Bivens-type claims. See McGrew, 122 F.3d at 848, see Kow, 58 F.3d at 425. Moreover, the Supreme Court views the exclusionary rule as a punishment for law enforcement officers, not a right of action for Bivens plaintiffs. It held in United States v. Leon, 468 U.S. 897 (1984):

> The [exclusionary] rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 354 (1974).

Id. at 906 (emphasis added). In fact, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Illinois v. Gates, 462 U.S. 213, 223 (1983), citing United States v. Havens, 446 U.S. 620 (1980); United States v. Ceccolini, 435 U.S. 268 (1978); United States v. Calandra, supra; Stone v. Powell, 428 U.S. 465 (1976). Therefore, it is important to note that this is not a typical exclusionary rule evidence case, but rather a monetary damages, Bivens-type case.[6]

Finally, the fact that the search warrant affidavit/application was not left with the Ramirezes was harmless error, as no property was seized from their residence. See, e.g., United States v. Baker, 888 F. Supp. 1521, 1531 (D. Haw. 1995), vacated and remanded on other grounds, 108 F.3d 339 (9th Cir. 1997) ("In this case, the court finds that no violation occurred, because the agents left a copy of the warrant at Baker's residence. However, even if they failed to do so, the violation would only be non-fundamental in nature"). Thus this case is distinguishable from both McGrew and Kow. See Order at p. 10 (ER Tab 9).

The Ramirezes argue on appeal that the search was overbroad because serial numbers of firearms were recorded and photos were taken. However, neither of these events is considered a seizure. The recording of serial numbers is not a seizure in that it does not "meaningfully interfere" with the person's possessory interest in either the serial numbers or

---

[6] The Ramirezes argue that holding persons personally liable for constitutional violations is the only effective means of deterring future constitutional violations because the exclusionary rule "has been rendered impotent with the creation of civil forfeiture statutes." Appellants Brief at p. 29. It is not clear what relevance this argument has to the facts of this case as there were no items seized or charges brought against the Ramirezes.

the item from which the serial number is taken. Arizona v. Hicks, 480 U.S. 321, 324 (1987) (citing Maryland v. Macon), 472 U.S. 463, 469 (1985). The officer recording the serial numbers, however, is required to have a lawful right of access to the objects themselves. See Horton v. California, 496 U.S. 128, 137 (1990). In this case, the United States Magistrate issued a search warrant for unlawful firearms and explosive devices which necessitated a search of the premises. Therefore the officers had a right to view the firearms on the premises and the recording of the serial numbers was lawful. The recording of the serial numbers was not a violation of Ramirezes' Fourth Amendment rights and the actions of the Federal and County Appellees in recording the serial numbers were objectively reasonable.

The Ramirezes also argue that taking photographs of the interior of their home was a violation of their constitutional rights and that the Federal and County Appellees should have stopped these actions from occurring. However, the taking of photographs of areas in plain view during a lawful search is considered to be within the scope of the warrant. Bills v. Aseltine, 958 F.2d 697, 707 (6th Cir. 1992). On the basis of the reasoning in Arizona, wherein the Supreme Court determined that the recording of serial numbers does not meaningfully interfere with any possessory interest, the Bills court held that recording visual images of a scene by means of photography also does not meaningfully interfere with any possessory interest. Id. at 707. When officers are properly on the premises, they can record scenes presented in their plain view. Id. The taking of photographs of the interior of the Ramirezes' home, therefore, was not a violation of their Fourth Amendment rights. There is also an important policy reason for the taking of photographs. Pursuant to Department of Treasury, Bureau of Alcohol, Tobacco and Fireamrs, ORDER-AFT 0 3220.1, pre-search photos are to be taken of the premises and, where practical post-search photographs are to be taken. The photos are to record the condition of the premises before and after the search and

location of physical evidence. The taking of photographs in this instance was simply not a violation of the Ramirezes' constitutional right.

The Ninth Circuit has "expressly and repeatedly warned against taking 'an overly technical view of the validity of search warrants and the application of the exclusionary rule . . . a realistic and pragmatic approach to the exclusionary rule is required' by the Supreme Court's decisions in this area." See Towne 997 F.2d at 549 (citations omitted). Such a pragmatic approach is equally warranted in this case. The district court correctly determined that there was no Fourth Amendment violation in this case.

* * *

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

March 3, 2003

Mr. Richard A. Cordray
4900 Grove City Road
Grove City, Ohio 43123

Re: Jeff Groh v. Joseph R. Ramirez, et al.
No. 02-811

Dear Mr. Cordray:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter

William K. Suter, Clerk

Supreme Court, U.S.
FILED
MAY 19 2003
OFFICE OF THE CLERK

No. 02-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

SCANNED

JEFF GROH, Special Agent with the Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

PARTIES TO THE PROCEEDING

The sole petitioner in this case, Jeff Groh, is an agent with the United States Bureau of Alcohol, Tobacco, and Firearms. Petitioner is a defendant in this case and was an appellee in the court below. Also named as defendants in this case were unnamed agents of the United States Government; Butte-Silver Bow County, Montana; John McPherson, the Sheriff of Butte-Silver Bow County; Joe Lee, the Undersheriff of Butte-Silver Bow County; and unnamed officers of Butte-Silver Bow County, none of whom is a party to the case before this Court. Petitioner is an individual who was sued in his individual capacity, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Joseph, Julia, Joshua, and Regina Ramirez are the plaintiffs in this case and were the appellants in the court below.

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INTRODUCTION

The constitutional question here raises two distinct issues. The threshold issue is whether the faulty notation contained in this warrant necessitates a judgment that the Fourth Amendment was violated. In the totality of the circumstances here, where the application and affidavit fully established probable cause and specified with particularity the items to be seized, where the search conformed to the parameters previously documented to the magistrate, and where respondents were fully informed of those parameters, no violation of the Fourth Amendment occurred. The further issue in this civil case is whether *petitioner himself* violated the constitutional rights of the respondents by the manner in which he executed the search of their premises. In the situation here, where the officer properly applied for a warrant, provided sufficient particularity in the application, obtained authorization from a neutral magistrate, executed the search in accordance with the correct parameters, and informed respondents upon their request of those parameters, petitioner's own actions did not violate the Fourth Amendment. To the extent that there was error here, the error lay in the wording of the court order constituting the judicial warrant – for which the magistrate, not the officer, is ultimately responsible. In addition, the Court's precedents strongly suggest that public officials are not personally liable for constitutional violations based on an alleged lack of due care.

Moreover, even if the Court were to decide that the Fourth Amendment was violated in this case, petitioner is entitled to qualified immunity. This result obtains under both of the two independent bases for granting qualified immunity that the Court has recognized. First, at the time petitioner engaged in this search, the law was not clearly established (in fact, no court had held) that the "leader" of a search who applied for the warrant is required to proofread the warrant after the magistrate has issued it, as the court of appeals held. Likewise, the law was not clearly established on whether the officer may cure a particularity defect in the warrant by providing a verbal description to the property owner at the scene of the specific items delineated in the application and the affidavit that the

magistrate approved. Second, and in the alternative, officers are not subject to personal liability for reasonable mistakes of fact, such as the proofreading error that petitioner made here, even if their mistakes may result in a violation of clearly established law. For any and all of these reasons, the decision below should be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is reported as *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a-12a. That opinion reversed an order and opinion of the United States District Court for the District of Montana, which had granted summary judgment to the defendants in a ruling that upheld petitioner's defense of qualified immunity. The District Court's opinion, which is unreported, is reprinted at Pet. App. 13a-25a. The Ninth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *See id.* at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing and rehearing *en banc* on July 25, 2002. Pet. App. 3a. This Court granted a timely request for extension of the time within which to file a petition for certiorari, which was extended to and including November 22, 2002. *See id.* at 36a. The petition for certiorari was filed on November 22, 2002, and the petition was granted on March 3, 2003. *See* J.A. 48. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Search Warrant and Its Execution.

This lawsuit stems from an investigation of respondents by the United States Bureau of Alcohol, Tobacco and Firearms. The investigation occurred after federal officials received complaints and information from concerned citizens who indicated that the Ramirez family was violating federal law by possessing and using unlawful weaponry at their ranch in western Montana. *See* Pet. App. 3a-4a, 13a-15a.

The petitioner in this case is Jeff Groh, who serves as a special agent for the Bureau. In May 1996, petitioner received two reports that the Ramirezes kept automatic weapons and grenades on their ranch. *See id.* at 14a. Petitioner met with Mr. Ramirez, who showed him around the premises; no illegal weapons were in evidence, and the visit ended amicably. *See id.* In February 1997, the undersheriff for the county passed on to petitioner a report from a frequent visitor to the Ramirez household that the Ramirez family had automatic weapons, grenades, a grenade launcher, and a rocket launcher on their property. *See id.* at 14a-15a.

In an effort to obtain evidence concerning these allegations, petitioner sought a warrant to search the Ramirez property. He prepared an application for a search warrant and a supporting affidavit, and presented them to a magistrate judge who issued a judicial warrant. The application properly described the place to be searched and the objects sought, which consisted of "automatic firearms" and specified "destructive devices," including grenades, grenade launchers, and rocket launchers. *See* Pet. App. 28a; *see also id.* at 30a-35a (elaborating basis for showing of probable cause). Nonetheless, the judicial warrant itself, which petitioner filled out for the magistrate in the first instance, omitted the latter information: in the space provided in the court's order for listing the items to be seized, the warrant

mistakenly included only a description of the Ramirez home. *See id.* at 26a. The judicial warrant made two direct references to petitioner's affidavit, and noted that the information in the affidavit provided the basis to "establish probable cause . . . and establish grounds for the issuance of this warrant." *Id.*

On March 4, 1997, petitioner accompanied other agents from the Bureau, along with the county sheriff and members of the county sheriff's department, to the Ramirez ranch in order to execute the warrant. When the officers entered the home, only Mrs. Ramirez was present. Petitioner told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." *Id.* at 4a. He also orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See id.* at 15a. The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the legal firearms that they found there. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As the officers left, petitioner gave Mrs. Ramirez a copy of the search warrant without the application or the affidavit, which had been filed under seal with the court. Nothing was seized, and no charges were ultimately filed against respondents. *See id.* at 4a, 15a.

The next day, Mrs. Ramirez faxed the warrant to her attorney, who called petitioner and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Petitioner replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized. *See id.* at 15a.

B. The District Court Proceedings.

The Ramirezes sued petitioner and the other officers who participated in the search under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983, alleging violation of their rights under the First, Fourth, Fifth, and Ninth Amendments and under Montana law. The principal *Bivens* claim was that the officers violated the Fourth Amendment by

undertaking a search of the Ramirez property pursuant to a defective search warrant. *See* Pet. App. 2a. Petitioner and the other defendants moved to dismiss all of the claims, or in the alternative for summary judgment, raising the defense of qualified immunity. *See id.* at 13a-14a.

The District Court treated the motion as one for summary judgment and ruled for the defendants. The court first held that there was no constitutional violation.[1] The court noted that it was undisputed that: (i) the particulars of the description provided in the warrant application were accurate and adequate; (ii) the officers participating in the search possessed accurate knowledge of what items they were looking for; (iii) plaintiffs themselves knew what items the officers sought based on the officers' verbal description at the scene; and (iv) petitioner faxed them the relevant portions of the application "showing the correct description of items to be seized, when he was notified of the mistake." Pet. App. 21a. Likening this case to "cases in which warrants contain inaccurate addresses," the court concluded that "[s]uch warrants do not necessarily violate the Constitution" merely because they are facially defective in particularity, unless the broader context shows the search to be unreasonable, which it was not here. *Id.* at 22a.

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[1] The District Court briefly noted a concession made at oral argument "that the warrant did violate the Constitution," Pet. App. 22a n.4, but pointed out that this was not the position taken in the defendants' brief, *see id.* As discussed above, the court decided the threshold constitutional issue, holding that the Fourth Amendment was not violated here. *See id.* at 20a-22a. This is the correct procedure in cases involving qualified immunity claims. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 839-55 (1998) (resolving qualified immunity case by deciding only constitutional due process issue); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (resolving Fourth Amendment issue against officers but proceeding on to uphold their defense of qualified immunity). In any event, there is no issue of waiver here because petitioner renewed his argument on the constitutional claim before the Court of Appeals, *see* J.A. 32-47 (excerpt from Federal defendants' brief), the Ninth Circuit expressly considered and decided that issue, *see* Pet. App. 5a-7a, and respondents did not raise any waiver issue in their brief in opposition to the petition for certiorari, which is when they would have been required to address the issue, *see, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

In the alternative, the District Court upheld the defense of qualified immunity. The court correctly recognized that there was *no* authority – binding or otherwise – holding that petitioner's conduct violated the Fourth Amendment at the time that he had acted. Although respondents argued that "each officer participating in the search . . . had an independent obligation to examine the warrant," they cited no "authority for that proposition, nor can I find cases to support it." Pet. App. 23a. In the alternative, the court held that the defendants' conduct met "the same standard of 'objective reasonableness' that it would apply in a suppression hearing." *Id.* at 22a. In its view, "constitutional tort liability does not take aim at technical defects unless and until they rise to the level of substantive deprivations." *Id.* at 23a. Because petitioner showed probable cause to support the warrant and followed "all the established procedures" in carrying out the search, he "acted in an objectively reasonable manner" and was entitled to qualified immunity. *Id.* Respondents' remaining constitutional and state-law claims were also dismissed. *See id.* at 23a-24.

C. The Decision by the Court of Appeals.

With respect to every defendant other than petitioner, the Ninth Circuit affirmed. With respect to petitioner, however, the court of appeals reversed, holding that he alone, as the "leader" of the search, had violated respondents' rights under the Fourth Amendment and was not entitled to qualified immunity. On the constitutional issue, the court relied on its decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), and declined to apply this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which recognized a "good faith" exception to the Fourth Amendment where officers execute a search warrant that a judicial officer had previously approved, as was true here. *See* Pet. App. 5a-7a. In particular, the court held that petitioner's verbal description to respondents during the search could not supply the particularity that was lacking in the warrant itself, and the supporting affidavit was irrelevant unless it was produced in conjunction with the warrant. *See id.* at 6a & n.2. The court reasoned that the warrant was a judicial order, which petitioner was authorized only to execute, not to alter. *See id.* at 6a.

The Ninth Circuit relied on its subsequent decision in *McGrew* to support its finding that the Fourth Amendment was violated. That decision did not even issue until months after the search warrant was executed in this case, though the court made no mention of that fact. *See id.* at 9a. In holding that petitioner alone, among all the agents and officers who participated in the search, was not entitled to qualified immunity, the court emphasized its own factual assessment that petitioner was the "leader" of the search. In the court's view, this meant that before petitioner helped execute the search warrant, he had a constitutional obligation to proofread the warrant to discover any flaws lurking in its terms, even after it had already been approved by a judicial officer. *See id.* at 8a-10a. The court further averred that had petitioner fulfilled this newly minted constitutional obligation, he "would surely" have realized the particularity defect, even though the magistrate had failed to do so. *Id.* at 10a. In the court's judgment, petitioner's failure to reread and correct the defect in the warrant made his conduct in executing the warrant "objectively unreasonable" and stripped him of any defense of qualified immunity. *See id.*

A timely petition for rehearing was denied with minor amendments to the panel opinion, *see id.* at 3a, and this petition for *certiorari* followed.

SUMMARY OF ARGUMENT

In qualified immunity cases, the Court has made clear that the parties should first address the issue of whether the defendants violated the constitutional rights of the plaintiffs, and then proceed to discuss the grounds for qualified immunity. *See, e.g., Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (resolving qualified immunity case by deciding only constitutional due process issue); *County of Sacramento v. Lewis*, 523 U.S. at 833, 839-55 (1998) (same); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (resolving Fourth Amendment issue against officers but proceeding on to uphold their defense of qualified immunity). Under either ground, petitioner should prevail here and his motion to dismiss should be granted.

First, petitioner did not violate the Fourth Amendment by

obtaining and executing the judicial warrant in this case. The defect in particularity in the warrant's description does not conclude the constitutional analysis. Petitioner accurately and fully specified the legal basis and scope of the search to the magistrate, and he and the other officers properly executed the search consistent with those particulars. Moreover, during the search they correctly notified respondents about the purpose and objects of the search, and they later provided respondents with the pertinent portions of the warrant application. Petitioner was acting on the authority of a judicial warrant issued upon a proper showing of probable cause and his conduct was reasonable before, during, and after the search. Under these circumstances, the purposes and demands of the particularity requirement were entirely satisfied, and the Fourth Amendment was not violated. In addition, the Court's precedents have strongly suggested that public officials cannot be held personally liable for violating the Constitution in the absence of intentional or reckless conduct, which is nowhere suggested here.

In addition, any violation of the particularity requirement that may be judged to have occurred in this case cannot be ascribed, as a constitutional matter, to petitioner himself, but rather to the magistrate who approved and issued the warrant, which is a quintessentially judicial act. A judicial warrant is a court order that commands action by other officials who are merely responsible to execute it in a reasonable manner. Here the warrant was properly issued upon a showing of probable cause, based on facts that petitioner specified with sufficient particularity, and it was only the judicial warrant that was formally defective. This difference is immaterial in criminal cases, where the issue is whether to exclude evidence from a subsequent judicial proceeding; it is crucial, however, in civil cases like this one, where the issue is whether to hold an individual officer personally liable in money damages for his or her official actions. Here petitioner properly gathered and presented the legal justification for the judicial warrant, and properly executed the search, including specifying to the property owners the particular items to be seized; the only error occurred in the wording of the court order constituting the

judicial warrant. In this situation, petitioner did not violate respondents' constitutional rights and cannot be held subject to personal liability for an alleged lack of due care in failing to proofread the warrant after it had been issued.

Second, even if the Court were to hold in this case – as a matter of first impression – that a defect in particularity in the warrant (but not the application and supporting affidavit) cannot be cured at the scene, and that a defect in a judicial warrant is the constitutional responsibility of the chief executing officer (but not the other officers), petitioner is entitled to a defense of qualified immunity here. At the time he acted, it was not apparent in the light of preexisting law that his conduct violated the Constitution. Indeed, the practice of correcting defects in the text of a warrant at the time of execution in order to conform to facts already specified to the issuing court is widespread, and such legal authority as existed at the time had generally upheld its validity. Even in the last few years, the most recent lower court opinions reveal deep divisions among judges over the question of whether these actions violate the Fourth Amendment at all. And there was simply no authority whatsoever for the novel "duty to proofread" that the court of appeals devised here. In these circumstances, to require law enforcement officers, or any public officials, to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages cannot be reconciled with the settled purposes of the qualified immunity doctrine.

Moreover, petitioner also is entitled to qualified immunity on an entirely separate basis. The Court's precedents hold that officers are not subject to personal liability for reasonable mistakes of fact, even if their errors may result in a violation of clearly established law. Where the officers' conduct is "objectively reasonable," measured under the same analysis that applies to the *Leon* "good faith" rule, qualified immunity is appropriate. In this case, in particular, petitioner's conduct in applying for the warrant and executing the search of respondents' ranch met this standard of "objective reasonableness," and he is thus entitled to qualified immunity.

ARGUMENT

Petitioner will begin by addressing the constitutional issue posed here, which is one of first impression, and show why he did not violate the Fourth Amendment. Petitioner then will proceed to discuss the controlling law that supports his defense of qualified immunity in this case. *See, e.g.*, *Wilson*, 526 U.S. at 617 (explaining the proper ordering of arguments in qualified immunity cases).

I. PETITIONER DID NOT VIOLATE THE FOURTH AMENDMENT BY HIS ACTIONS IN OBTAINING AND EXECUTING THE WARRANT.

Petitioner did not violate the Fourth Amendment in this case, for two reasons. First, the defect in the warrant here must be evaluated against the totality of the circumstances in which this search was performed. In that context, petitioner's actions were reasonable and they did not infringe any of respondents' constitutional rights. Moreover, the Court has made clear that public officials are not personally liable for constitutional violations based on an alleged lack of due care. Second, if a constitutional violation were to be founded upon the defect in this warrant, the actual responsibility for that defect properly lies with the magistrate judge who issued the court order comprising the judicial warrant; it does not properly lie with the officers subject to its commands, who merely executed its terms and did so in a reasonable manner here.

A. Although the Warrant Lacked Particularity, the Fourth Amendment Was Not Violated.

In retrospect, as the defendants conceded below, *see* Pet. App. 6a, the warrant in this case was deficient in particularity because it provided no description of the type of evidence sought. The Court's precedents make clear, however, that a shortcoming in the details of a warrant does not necessarily create a violation of the Fourth Amendment. On the contrary, the constitutional provision is not violated unless it is shown that the deficient description in the warrant actually led to an unreasonable search or seizure that constituted an infringement

upon the complaining party's substantive rights. *See, e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987) (officers who acted reasonably in executing a warrant that appeared valid when issued, but turned out to be overbroad, did not violate the Fourth Amendment); *cf. Hill v. California*, 401 U.S. 797, 803-04 (1971) (warrantless arrest of wrong man based on reasonable mistake of fact did not violate the Fourth Amendment).

As discussed below, there was no violation of the Fourth Amendment in the circumstances of this case. Petitioner provided the magistrate with a complete and detailed description of the places to be searched and the items to be seized. He obtained a warrant after justifying the proposed search upon a valid showing of probable cause. The search was carried out entirely within the boundaries of the parameters previously documented to the court. When respondents requested more information, they were promptly and correctly notified about the purposes and objects of the search, both verbally and later in writing. The search itself was conducted in a reasonable fashion, and the goals served by the particularity requirement were fully met. Finally, the Court has made it clear that public officials cannot violate the Constitution when their actions, at most, amount to some degree of negligence, as is alleged here.

1. Petitioner Here Sought and Obtained the Warrant by a Proper Showing of Probable Cause, Based on Particulars that Were Sufficiently Specified to the Magistrate.

Petitioner sought and obtained the search warrant at issue in this case based on substantial information that was amassed during an on-going investigation of complaints from concerned citizens and local officials. Several informants had told officials that the Ramirez family was violating federal law by possessing and using unlawful weaponry at their ranch in western Montana. *See* Pet. App. 3a-4a, 13a-15a. The prohibited items allegedly present on the ranch included automatic weapons, grenades, a grenade launcher, and a rocket launcher. *See id.* at 14a-15a. It is undisputed that the possession and use of such items violates federal law. *See, e.g.*, 18 U.S.C. § 922(o) & 26 U.S.C. § 5861.

Petitioner paid one consensual visit to the ranch that turned up no evidence of any such prohibited items. More than a year later, in response to the disclosure of further information reinforcing the same concerns, petitioner sought a warrant to search the Ramirez property. *See* Pet. App. 30a-33a. He prepared an application for a search warrant and a supporting 18-paragraph affidavit, which supplied considerable detail concerning the information that had been received about the alleged weapons located on the ranch. *See id.* at 28a-35a. The application properly described the place to be searched and the objects sought, which consisted of "automatic firearms" and specified "destructive devices," including grenades, grenade launchers, and rocket launchers. *See id.* at 28a.

It is uncontested that the information that petitioner included in the application and the supporting affidavit supplied ample basis for the requisite showing of probable cause to search respondents' ranch. *See id.* at 30a-35a (elaborating basis for showing of probable cause). As a result, when petitioner presented all of this supporting information to the United States District Court for the District of Montana, the magistrate judge made the determination of probable cause and issued a judicial warrant authorizing the requested search. *See id.* at 26a-27a. The judicial warrant constituted a court order commanding petitioner and any authorized officer of the United States to conduct the requested search during daylight hours on or before a specified date. *See id.* The judicial warrant made two direct references to petitioner's affidavit, and noted that the information in the affidavit sufficed to "establish probable cause . . . and establish grounds for the issuance of this warrant." *Id.* at 26a, 27a.

It is further uncontested here that the application and affidavit which petitioner submitted to the court contained sufficient detail to satisfy the particularity requirement of the Fourth Amendment. Nonetheless, the judicial warrant itself omitted the detailed information contained in the application and affidavit about the items to be seized: in the space provided in the court's order for listing the items to be seized, the warrant included only a description of the Ramirez home. *See id.* at 26a.

In keeping with common practice, and as an aid to the court, petitioner apparently had filled out a proposed warrant form and inadvertently inserted a description of the residence in the space provided for the court to specify the items to be seized. *See id.* at 4a. The magistrate, in turn, failed to notice the omission and incorporated the error into the court's order.

As the District Court summarized the problem, the upshot is that the warrant included "a typographical error . . ., an error undetected by either [petitioner] or Magistrate Judge Holter." *Id.* at 23a. Nonetheless, there is no dispute in this case that petitioner sought and obtained the warrant by a proper showing of probable cause, based on particulars that were sufficiently specified to the magistrate judge. As this Court has observed in a very similar context, "[a]t this point, a reasonable police officer would have concluded, as [petitioner] did, that the warrant authorized a search for the materials outlined in the affidavit." *Massachusetts v. Sheppard*, 468 U.S. 981, 989 (1984).

2. The Officers Acted Reasonably During the Search and Observed the Parameters Already Documented to the Magistrate.

In evaluating the reasonableness of petitioner's conduct for Fourth Amendment purposes, it is significant also that in executing the search warrant in this case, petitioner and his fellow officers did not exceed the parameters of the search specified in the detailed information petitioner had submitted to the court in the original application and affidavit. The error, in other words, lay only in the nonconformity of the warrant to the application and affidavit.

The search of respondents' ranch took place within the time frame specified in the warrant, occurred during daylight hours, and was conducted in a reasonable manner.[2] The officers

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[2] The officers did permit a media crew to stand just outside the Ramirez' property and videotape their activities during the search. *See* Pet. App. 15a. Yet this search was conducted before the Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), which disapproved of media accompanying police into

searched the ranch, the home, and the outbuildings only for illegal weapons and explosives. No illegal weapons were found, nothing was seized, and no charges were ultimately filed.

The Court has held that "the purposes justifying a police search strictly limit the permissible extent of the search." *Garrison*, 480 U.S. at 87. Therefore, it is important to note here that petitioner acted in compliance with the purposes justifying this search, which he had already fully documented on the record to the magistrate who issued the warrant. *See, e.g.*, *Wilson*, 526 U.S. at 611 (Fourth Amendment requires "that police actions in execution of a warrant be related to the objectives of the authorized intrusion"). Although in retrospect the warrant that the court issued in this case was deficient in its description of the items to be seized, the Court "has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Garrison*, 480 U.S. at 87.

3. Petitioner Acted Reasonably by Informing Respondents of the Items to Be Seized and the Goals Served by the Particularity Requirement Were Satisfied Here.

At the time that petitioner and the other officers executed the warrant and entered the Ramirez home, they orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See* Pet. App. 15a. Once again, the description given to respondents accorded with the particulars that petitioner had specified to the court in the original warrant application and supporting affidavit. These facts are undisputed. *See id.* They also left the warrant with Mrs. Ramirez. The next day, upon request from respondents' attorney, petitioner faxed him the page of the application that contained the full list of items to be seized. *See id.* at 15a-16a.

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a private residence, and in any event it is not at all clear that videotaping the scene from outside the property would be prohibited under that decision. Nor is this aspect of the officers' conduct at issue in the case before this Court.

It thus is clear that, notwithstanding the formal defect in the warrant, both the magistrate and respondents were fully informed of the particular items to be seized. In this light, "[w]hen judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,'" petitioner's conduct in this case was "reasonable and valid under the Fourth Amendment." *Hill*, 401 U.S. at 804-05 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (Rutledge, J.)). Petitioner's actions throughout the course of this prolonged investigation, in the application process for judicial permission to proceed with a search, and during the execution of the search, were in almost every respect beyond reproach. The only mistake he appears to have made was inadvertently to omit certain information in the draft warrant form, though he had included the same information in extensive detail in the application and affidavit that he submitted to the court. Neither he nor the magistrate noticed the omission at the time that the court issued the warrant. This shortcoming is simply insufficient to ground a violation of the Fourth Amendment. As the Court has plainly declared, "we have not held that 'reasonableness' precludes error with respect to those factual judgments that law enforcement officials are expected to make." *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990).

It should be underscored, moreover, that the court of appeals did not rely on petitioner's omission of the items to be seized in the warrant form he drafted for the magistrate. Indeed, that fact had no bearing on the court's analysis of the issue under review here. Rather, it was petitioner's failure as "leader" of the search to *proofread* the warrant, after the magistrate had approved it, that was held to violate the Constitution. *See* Pet. App. 8a. The result and analysis would be unchanged if another officer, or indeed the magistrate, had drafted the warrant in the first instance. It still would have fallen to petitioner, under the court's analysis, to double check the magistrate's handiwork.

The Court has recognized that in the fast-moving and often jumbled realm of law enforcement, mistakes do happen and it is not unreasonable for an officer to rely on the presumed

correctness of court orders. Here, as in other situations arising under the Fourth Amendment, "[o]fficers can have reasonable but mistaken beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution." *Saucier v. Katz*, 533 U.S. 194, 206 (2001); *see also Hill*, 401 U.S. at 804 ("sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment"); *Sheppard*, 468 U.S. at 989 (rejecting argument that the officer "should have examined [the warrant] to make sure that the necessary changes had been made").

In particular, here it was objectively reasonable for petitioner to assume, without stopping to reconfirm, that the judicial warrant issued by the court authorized the search in accordance with the terms of his application. The Court has explicitly addressed this issue elsewhere and held that it was reasonable for "the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and . . . had good reason to believe that the warrant authorized the seizure of those items" to act on that basis. *Sheppard*, 468 U.S. at 989 n.6. As the Court put the point: "We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.*

Moreover, the goals served by the particularity requirement – to prevent general searches, to prevent the seizure of one thing under a warrant describing another, and to prevent warrants from being issued on vague or dubious information – were fully satisfied here. "The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Garrison*, 480 U.S. at 84.

Those purposes were fully met in this case. Here petitioner

had completely and accurately documented the objects of the proposed search in his warrant application and affidavit that he submitted to the court. *See* Pet. App. 28a-35a. Any variance in the actual search from these parameters could be monitored and redressed. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 564-66 (1976) (holding that checkpoint stops are permissible, even without the judicial authorization of a warrant, because their reasonableness turns on factors, such as location and method of operation, that are available for "post-stop review"). Certainly it is not ideal for a warrant to contain errors that reduce its precision, but in practice such problems do arise, and the constitutional question here is whether such mistakes inevitably render the ensuing conduct unreasonable *per se* under the Fourth Amendment. The Court has already answered that question in the negative. *See, e.g.*, *Garrison*, 480 U.S. at 84-89 (defect of particularity did not cause ensuing search to violate Fourth Amendment); *Sheppard*, 468 U.S. at 990 n.7 (depreciating consequences of defect in particularity where, as is true in this case, "if the judge had crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid").[3]

In sum, both during and after the execution of the warrant in this case, petitioner fully apprised respondents of the purpose and objects of the search. Moreover, the account he provided to them included, both orally and in writing, reference to the detailed information that he had provided to the court in the original warrant application and supporting affidavit. On the whole, in the circumstances presented here, petitioner's conduct was both "objectively reasonable and largely error-free." *Sheppard*, 468 U.S. at 990.

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[3] The Court has also explained that certain items, such as books and papers that contain mental impressions, may merit greater protection when they are the objects of a government search. *See, e.g.*, *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (books); *Boyd v. United States*, 116 U.S. 616, 622-38 (1886) (private papers). Here, however, there were no such concerns, as the objects of this search were illegal weapons and dangerous ordnance.

B. Any Constitutional Violation Here Was the Responsibility of the Magistrate Who Erred in Issuing the Judicial Warrant, Not the Officers Who Executed It in a Reasonable Manner.

The constitutional issues framed here are grounded entirely on the formal deficiency in the text of the judicial warrant. A judicial warrant is a court order, issued by a neutral magistrate, that commands government officers to execute certain acts. *See, e.g.*, Pet. App. 26a-27a. Although the officers act as witnesses to establish the basis for issuing the warrant and as executors to carry out its commands, the warrant itself is an order issued by a court, for which the court and its own judicial officers are ultimately responsible. In this civil case, in particular, if the Court were to find that the defects in the judicial warrant created a violation of the Fourth Amendment, it would be utterly inappropriate to impose personal liability in money damages upon the executive officers who actually performed the search in a reasonable manner.

1. The Court Had Probable Cause to Issue the Warrant, Based on Facts Specified with Sufficient Particularity, So Petitioner Should Not Be Held Liable for Its Defects.

The judicial warrant issued by the magistrate judge did not conform to the application and the supporting affidavit testimony submitted by petitioner, which specified the evidence sought with sufficient detail to justify the search of respondents' ranch and to comply with the Fourth Amendment. *Compare* Pet. App. 26a-27a (judicial warrant) *with id.* at 28a-35a (warrant application and supporting affidavit). Indeed, the warrant application completed by petitioner described the items to be seized as "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." *Id.* at 28a. That description, as provided in writing to the court, is a model of particularity; taken together with the more comprehensive

explanation set out in the attached affidavit, this documentation clearly provided probable cause to issue a warrant for the proposed search. As a constitutional matter, any error that occurred in the court's order here was the magistrate's sole responsibility, and it cannot provide a basis for holding the officers personally liable in money damages.[4]

In *Sheppard*, the Court presented the core insight that governs the situation presented here: "An error of constitutional dimension may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake." *Id.* at 990. In fact, the central purpose of denying qualified immunity in *Bivens* actions to enforce the provisions of the Fourth Amendment, as with the exclusionary rule, is "to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Illinois v. Gates*, 462 U.S. 213, 263 (1983) (White, J., concurring). Ultimately, it is "the magistrate's responsibility" to "issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 U.S. at 921.[5] The officer may try to be helpful by providing a draft order, but he does not thereby take on a constitutional responsibility, on pain of personal liability, to oversee proper completion of the judicial function.

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[4] This is not to deny that petitioner's oversight when he submitted a draft of the judicial order contributed to the ultimate defect in the warrant. But the act of drafting a judicial order does not transfer constitutional responsibility from the court to the draftsman, and any rule to the contrary would be unworkable and revolutionary.

[5] In *Leon*, the Court further noted that "[o]ur discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. *Cf. Massachusetts v. Sheppard*, 468 U.S. at 989, n.6 ("[I]t was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested")." *Leon*, 468 U.S. at 918 n.19. In this case, of course, petitioner and the other officers did just that: they executed the warrant in accordance with the parameters they had specified to the court in the warrant application and supporting affidavit. *See supra* Part I.A.2.

2. The Fourth Amendment Does Not Require Officers to Proofread Judicial Warrants Issued with Probable Cause.

The court below imposed a novel "proofreading" requirement on some but not all of the officers involved in executing a warrant (including petitioner in this case). *See* Pet. App. 5a-10a. No such requirement can be squared with this Court's own precedents, nor could it have been foreseen by an officer in the field.

The Court addressed strikingly similar circumstances in the *Sheppard* case – a case that was never discussed or even mentioned by the court below. In *Sheppard*, as here, the court issued a warrant that did not describe with particularity the items to be seized. The problem in *Sheppard* was that the officers had adapted a warrant form used to conduct a search for controlled substances, and failed to make the necessary changes to convert that template into a warrant form appropriate to undertake a search for evidence in a homicide investigation. The judge decided to issue the warrant, and indicated that he had made the necessary changes. The officers then executed the warrant in accordance with the terms they had specified to the judge, based on their reasonable belief that the judge had issued the warrant with the necessary corrections to render it valid in all of its details. In that posture, this Court defined the Fourth Amendment issue as "whether there was an objectively reasonable basis for the officers' mistaken belief" that "the search they conducted was authorized by a valid warrant," and determined that there was. *Id.* at 988.

In analyzing the issue, the Court concluded that "[t]he officers in this case took every step that could reasonably be expected of them." *Id.* at 989. In particular, the Court strongly rejected the contention that the officers had any duty to recheck a judicial warrant after the court had issued it to make sure that all the particulars were correct. In the critical passage for the issue presented here, the Court reasoned as follows:

> [Plaintiff] contends that, since [the officer] knew the warrant form was defective, he should have examined it to make sure that the necessary changes had been made. However, that argument is based on the premise that [the officer] had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made. Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, *we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.*

Id. at 989-990 (emphasis added). *See also Illinois v. Krull*, 480 U.S. 340, 349 (1987) ("the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it").

The Court did recognize that in certain situations, it might be sensible to expect officers to review the warrant before they execute it. But where, as here, the officers involved in the search already had specified its scope to the magistrate, the Court held that they were under no such further obligation. In this connection, the passage bears repeating in full:

> Normally, when an officer who has not been involved in the application stage receives a warrant, he will read it in order to determine the object of the search. In this case, [petitioner], the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items. Whether an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the search would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested.

Sheppard, 468 U.S. at 989 n.6. *Sheppard* thus rejected the

notion of a constitutional "duty to proofread," which the court below unilaterally and retrospectively imposed on petitioner. Nor do the policies behind the particularity requirement, or the Fourth Amendment as a whole, justify its imposition.

II. PUBLIC OFFICIALS CANNOT BE HELD PERSONALLY LIABLE FOR VIOLATING THE FOURTH AMENDMENT BASED ON AN ALLEGED LACK OF DUE CARE.

In a variety of settings, the Court has refused to impose civil liability on public officials for constitutional violations based on an alleged lack of due care. In *Daniels v. Williams*, 474 U.S. 327 (1986), for example, the plaintiff was a prisoner who was injured when he fell on a prison stairway. Blocked from suing the prison officials in state court, he sued in federal court, claiming that he was being deprived of "due process of law." In evaluating this claim, the Court left open "the possibility that there are other constitutional provisions that would be violated by mere lack of care," but held that "such conduct does not implicate the Due Process Clause of the Fourteenth Amendment." *Id.* at 334. This provision is "simply not implicated by a negligent act of an official causing unintended injury to life, liberty, or property," as historically it "has been applied to deliberate decisions of government officials." *Id.* at 331. *See also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (same).

As the Court noted in *Daniels*, the same higher threshold has been maintained for other constitutional claims as well. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that the standard of civil liability for government officials under the Eighth Amendment requires a showing of "deliberate indifference." *Id.* at 104. In subsequent cases, it has been clarified that "deliberate indifference describes a state of mind more blameworthy than negligence." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Similarly, for constitutional claims based on the Equal Protection Clause, civil litigants are required to make a showing of "invidious discriminatory purpose." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429

U.S. 252, 270-71 & n.21 (1977).

The clear tenor of the Court's decisions is that only rarely, if at all, will public officials be held personally liable for constitutional violations based only on some degree of negligence. Indeed, the Court has never authorized liability against a government official for a constitutional violation based on an alleged lack of care. Justice Brennan once stated the prevailing rule in just this manner: "in order to prevail in any *Bivens* action, recipients such as respondents must both prove a deliberate abuse of governmental power, rather than mere negligence." *Schweiker v. Chilicky*, 487 U.S. 412, 447 (1988) (Brennan, J., dissenting) (citing *Daniels*).[6]

The same principles should apply under the Fourth Amendment: "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Anderson*, 483 U.S. at 644. Indeed, if anything, the threshold for constitutional liability should be even higher in the case of the Fourth Amendment, which is not a categorical prohibition on government action, but instead incorporates a "reasonableness" standard that acknowledges the need to balance limits on official action with effective law enforcement.

The Court's opinion in *Franks v. Delaware*, 438 U.S. 154 (1978), quite strongly suggests that the same principle obtains under the Fourth Amendment. In prescribing the analysis for

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[6] Although many of the cited cases are actions brought against state officials under 42 U.S.C. § 1983, rather than *Bivens* actions against federal officials, the Court has described the two as "counterparts." *Farmer*, 511 U.S. at 839. Although the Court has "never expressly held that the contours of *Bivens* and § 1983 are identical," it "has recognized sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors 'would be incongruous and confusing.'" *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 499 (1978)). Moreover, the Court has also held that the standards that govern qualified immunity are the same in *Bivens* actions and § 1983 cases. *See Wilson*, 526 U.S. at 609.

challenging a falsehood or omission made by an officer in a warrant application or the supporting affidavit, the Court was very clear: "allegations of negligence or innocent mistake are insufficient." *Id.* at 171. Rather, in order to obtain a hearing at all, the defendant must allege that the officer was guilty of a "deliberate falsehood or of reckless disregard for the truth." *Id.*

The line drawn in *Franks* is important here for several reasons. First, it suggests that this lawsuit, the gravamen of which is the inadvertent failure to proofread the warrant, is not a proper *Bivens* action at all. If officers cannot properly be held liable for Fourth Amendment violations based merely on an alleged lack of due care, then this lawsuit should have been dismissed at the threshold.

Franks also reinforces the conclusion reached in the preceding sections that there was no Fourth Amendment violation by petitioner in this case. It certainly calls into question the implicit holding by the court below that a defect in the text of the warrant necessarily constitutes a violation of the particularity requirement. Under the reasoning in *Franks*, an officer's innocent or negligent mistake – even one that was material to the magistrate's determination of probable cause – cannot create a constitutional violation unless it rises to the level of a deliberate or reckless falsehood. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.4(b), at 487-97 (1996). There is no obvious reason why the legal standard for evaluating alleged defects in particularity should be treated any differently, and in particular there is no reason why all such defects should be regarded as *per se* violations of the Fourth Amendment. Yet that was essentially the approach that the Ninth Circuit adopted in this case, *see* Pet. App. 4a-5a, as its analysis began and ended with the deficiency in the text of the warrant.

Under this unwieldy approach, any material misnotation – for example, a transposition of numbers in the homeowner's address – would violate the Constitution. But the particularity requirement is only one component of the Warrant Clause, which itself specifies that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const.,

amend. IV. Thus the same approach should apply to both the particularity and the probable cause requirements, and the ruling below cannot be reconciled with *Franks*.

Moreover, *Franks* is also instructive here for its reliance on the independent role of the judicial magistrate in evaluating the allegations in the affidavit. Part of the rationale for the holding in *Franks* is that "[b]ecause it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." 438 U.S. at 165 (citation omitted). *Franks* thus recognizes a division of responsibilities in the warrant process, in which the officer gathers information to support a showing of probable cause and the magistrate undertakes an independent review of that information (which would be subverted by the kind of officer malfeasance at issue in *Franks*). Although the officer may not purposely or recklessly mislead the magistrate, the officer does not serve in this constitutional scheme as the ultimate guarantor of the accuracy of the judicial warrant.[7]

The Court's precedents thus strongly suggest that petitioner cannot be held liable here for conduct that allegedly evinced a lack of due care. Accordingly, even if there had been a violation of the Fourth Amendment in the circumstances of this case – a point that we vigorously dispute – petitioner could not be held personally liable under *Bivens*.

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[7] This is another reason why the distinct questions of whether there was a Fourth Amendment violation and whether *petitioner* committed such a violation must be kept analytically distinct. *See supra* Part I.B; *see also Sheppard*, 468 U.S. at 990 ("An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake."); *Leon*, 468 U.S. at 920 ("In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgement that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.") (quotation omitted).

III. IF THE COURT HOLDS THAT SUCH CONDUCT VIOLATES THE CONSTITUTION, PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY.

The Court has consistently held that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Wilson*, 526 U.S. at 609-10. *See also infra* Part III.A.

Rather than define the legal test in this manner, the Ninth Circuit blurred the issue here by stating that "[l]aw enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances." Pet. App. 7a. We agree that "objective reasonableness" is a proper basis for invoking the defense of qualified immunity, and it is especially relevant when the defendant officials have made a mistake of fact. *See, e.g., Malley*, 475 U.S. at 345-46; *see also infra* Part III.B. But this basis serves as a separate and distinct ground for granting qualified immunity. *See, e.g., Saucier*, 533 U.S. at 205. A court must also consider the criteria of "clearly established law," and the court of appeals entirely omitted that part of the analysis in this case. By thus misstating the proper test, the court gave itself broad leeway to find petitioner liable simply for failing to "predict the future course of constitutional law," which this Court has denounced. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

A. Qualified Immunity Protects Officers Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law.

The qualified immunity doctrine is grounded in the Court's recognition that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them or deter them from fulfilling their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Crawford-El v. Britton*, 523 U.S. 574, 579 n.2 (1998).

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Nor may a court saddle public officials with personal liability merely because it may be adamantly persuaded that its own legal judgments should have been obvious to everyone at all times. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Malley*, 475 U.S. at 341. Only in the most egregious circumstances is it appropriate to expose public officials to the prospect of paying money damages out of their own pockets for violations that courts discover in hindsight but that were not clearly dictated by prior precedents. As the discussion in Part I, *supra*, makes clear, however, this is not such a case.

1. The Ninth Circuit Departed from This Court's Controlling Precedents When It Denied Qualified Immunity.

The ruling below sharply departed from the doctrine of

qualified immunity that the Court has developed to protect the reasonable actions of government officials. The Fourth Amendment issue raised in this case has not been definitively determined by the precedents of this Court or any other court. It presents difficult questions on the merits. It had been decided in favor of the constitutionality of petitioner's conduct in decisions rendered before he acted. And, at the time of his actions, this issue had never been decided adversely to such conduct by *any* court. In these circumstances, the Court's precedents uniformly uphold petitioner's defense of qualified immunity from the claims asserted in this lawsuit.

To guide the qualified immunity analysis, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.* Thus, it is not enough simply to allege that the underlying constitutional right has been violated as a general matter; instead, the constitutional issue must be framed more narrowly in light of the specific circumstances that the official confronted at the time he or she acted. *See id.* at 640-41; *see also Saucier*, 533 U.S. at 201-02; *Wilson*, 526 U.S. at 614-15. Second, in making this determination, it is proper to look to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time. *Procunier*, 434 U.S. at 565. *See also Davis*, 468 U.S. at 192 & n.9. This Court has defined "clearly established" law to mean that some such controlling authority must have already addressed and clarified the specific legal issue at stake. *See, e.g., Wilson*, 526 U.S. at 617. Within this framework, the court below made two significant errors.

First, the Ninth Circuit largely accepted respondents'

generalized arguments that conflated the determination of an underlying constitutional violation with the applicability of qualified immunity. In *Anderson*, the Court noted that, in practice, operation of the qualified immunity standard greatly depends on the level of generality at which the relevant "legal rule" is identified. *See* 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the established defense of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at such an abstract level of generality would eviscerate the important protections that the Court affords through the doctrine of qualified immunity, and hence that approach is untenable. *Id.*; *see also Wilson*, 526 U.S. at 614-17.

The ruling below exemplifies this flaw. The Ninth Circuit held that because the text of this warrant did not satisfy the particularity requirement, the Fourth Amendment was necessarily violated and qualified immunity was rendered inapplicable. *See* Pet. App. 5a-10a. As shown above, this conclusion is inconsistent with the Court's own case law. *See supra* Part I. In addition, the court of appeals applied the very same generalized approach that the Court so strongly criticized and ultimately rejected in *Anderson*. *See, e.g.*, 483 U.S. at 639. It simply recited the fact of the facial defect and then averred that the defect was incurable. *See* Pet. App. 6a. For purposes of qualified immunity, the pertinent issue is not whether the text of this warrant violated the particularity requirement. Instead, it is whether at the time these officers were on notice, because of clearly established law, that they were constitutionally required to proofread the warrant after it was issued or that they were constitutionally prohibited from "curing" its defectiveness by providing respondents at the scene with all the relevant information (as previously documented to the court).

Second, the Ninth Circuit failed to obey, or even to discuss,

this Court's plain teaching that the law must already be clearly established at the time petitioner acted in order to defeat his claim of qualified immunity. On the contrary, in treating the Fourth Amendment issue, the court relied on its decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1984), which was not even issued until September 12, 1997 – more than six months *after* the underlying search in this case had occurred on March 7, 1997. *See* Pet. App. 9a. At the time petitioner acted, the *only* judicial decision on point in the Ninth Circuit was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's conviction. *See McGrew*, 122 F.3d at 848-49.

The Court held squarely in *Mitchell* that it is reversible error for a court to deny qualified immunity on the basis of subsequent decisions. *See* 472 U.S. at 535. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See Mitchell*, 472 U.S. at 533 (citing cases). Within days after the officials authorized the wiretap challenged in *Mitchell*, two other federal courts held such conduct to be illegal, but those decisions postdated the events in question. *See id.*

Accepting the federal officials' defense of qualified immunity, the Court held that in light of the two unpublished decisions extant at the time, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. Officials "performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* "The

decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Supreme Court itself intervened to decide the issue two years later. *Id.* Likewise here, the court of appeals engaged in "hindsight-based reasoning" premised on a decision that postdated the conduct at issue in this case.

2. The Ninth Circuit Erred in Its Analysis of the Prevailing State of the Law at the Time Petitioner Acted.

To the extent that the Ninth Circuit addressed the more specific decisional law in effect at the time of petitioner's search, it misstated the thrust of those decisions.

The closest of this Court's precedents on the constitutional issue here is *Sheppard*, and hence it is telling that the Ninth Circuit never discussed or even cited that case in the ruling below. Indeed, in another case the Ninth Circuit has accurately characterized the holding in *Sheppard* as "appl[ying] the good faith exception to a warrant involving a 'clerical error' by the issuing judge that resulted in a violation of the particularity requirement of the Fourth Amendment." *United States v. Luk*, 859 F.2d 667, 675 (9th Cir. 1988). That precisely describes the situation in this case. Moreover, even in *Sheppard* itself the Court simply presumed without explicitly deciding that the police conduct actually violated the Fourth Amendment. *See* 468 U.S. at 988 n.5. As discussed above, the better view of these circumstances would be that the particularity defect does not give rise to any violation of a constitutional dimension; indeed, this view is squarely grounded in the analysis forcefully presented in Justice Stevens' separate concurrence in *Sheppard*. *See supra* Part I; *see also* 468 U.S. at 960-65 (Stevens, J., concurring). At a minimum, however, the Court's own precedents cast doubt on whether petitioner violated any "clearly established" law.

The Ninth Circuit's own case law proves no more effective at clearly establishing the law either on the ability to cure a defective warrant at the scene or on the supposed duty to proofread the text of a warrant after it has been issued. As to

the former, the line of decisions cited in *McGrew* was in fact quite tenuous. In cases such as *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993), and *Luk*, the court had opened the door wide to application of the *Leon* "good faith" doctrine in cases where search warrants were found to be insufficiently particular, but the underlying affidavits contained more information to supply the deficiency. *See, e.g., Towne*, 997 F.2d at 547-50 & n.6 (rejecting a "flat rule" that a supporting affidavit must be physically attached to a warrant because the Constitution does not "draw the line between lawful and unlawful searches according to the presence or absence of a staple, a paper clip, a bit of tape, or a rubber band," and suggesting the "good faith" doctrine may apply even where the warrant does not incorporate the affidavit by reference); *Luk*, 859 F.2d at 677 n.10 ("although we noted in *Crozier* that an agent's possession of the affidavit when he conducts the search pursuant to an overbroad warrant is *evidence* of good faith, . . . we do not read *Crozier* to hold the converse: that the absence of the affidavit at the scene *precludes* a finding of good faith"); *see also United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982) (holding that a search warrant may be construed with reference to the accompanying application, but not requiring the application to accompany the warrant in all instances). Combined with this Court's settled instruction that qualified immunity and the *Leon* good faith doctrine are equivalent, *see infra* Part III.B.1, these cases gave no plausible forecast that petitioner could find himself held personally liable for the comparable conduct in this case.

Even *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), which respondents cited in their opposition to certiorari as having settled the issue, plainly failed to do so: in a footnote toward the end of that opinion, the court referred to its prior discussion in *Luk*, which had suggested that "the failure to have a limiting affidavit present at the time of a search would not necessarily preclude a finding of good faith reliance." *See id.* at 430 n.4 (citing *Luk*, 859 F.2d at 677 n.10). All the Ninth Circuit said in *Kow*, however, was that the suggestion in *Luk* "may" not be "an accurate reflection of the current status of our law," and

in the end the panel concluded that on the facts of the *Kow* case "we need not resolve any question regarding the application of the *Luk* footnote." *Id.* These tentative ruminations hardly amount to "clearly established" law.

A close examination of the ruling below and the cases cited by respondents reveals that at the time petitioner acted, no controlling decision (and indeed no decision by *any* court in the country) had ruled that his actions would violate the Fourth Amendment. Only the subsequent decisions by the Ninth Circuit in *McGrew* and in this case, and by the Third Circuit in *Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (3d Cir. 2000) (excepting its holding on qualified immunity, which upheld the defense), are now to the contrary.

Moreover, the proper resolution of this question is not obvious even today (more than six years later), and many other courts continue to disagree with the Ninth Circuit's position as expressed in *McGrew* and in this case. *See, e.g., United States v. Thomas*, 263 F.3d 805, 808-09 (8th Cir. 2001) (warrant with incorrect address is defective in particularity but detail in unincorporated affidavit justifies applying the *Leon* good-faith rule), *cert. denied*, 534 U.S. 1146 (2002); *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990) (warrant containing no address; same), *cert. denied*, 498 U.S. 1094 (1991); *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998) (unattached affidavit permitted to supply the particularity that was lacking, thus showing good faith under *Leon*); *United States v. Cherna*, 184 F.3d 403, 413 (1999) (same; expressly disavowing *McGrew*), *cert. denied*, 529 U.S. 1065 (2000); *United States v. Shugart*, 117 F.3d 838, 845-46 (5th Cir.) (same; warrant stated wrong items to be seized but unincorporated affidavit had correct information), *cert. denied*, 522 U.S. 976 (1997). Indeed, in *Wilson*, the Court specifically noted that where the federal courts of appeals are split on the underlying constitutional issue, qualified immunity is proper: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of

the controversy." *Wilson*, 526 U.S. at 618.[8]

Ignoring the tangle of case law in the lower courts – which it never even acknowledged – the Ninth Circuit here forged an entirely new doctrine of liability for law-enforcement officers in Fourth Amendment cases. Picking out "the leaders of the search team" for special responsibility, the court held that such leaders "must actually read the warrant and satisfy themselves that . . . it is not defective in some obvious way." Pet. App. 8a. *No prior case* had ever rendered such a holding. Indeed, the two prior Ninth Circuit cases cited for this proposition, *see id.* at 8a-9a, had held exactly to the contrary.

In the first of these cases, *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986), the court held that officers executing a warrant must "inquire as to the nature and scope of the warrant," but stressed that "it was not necessary for all or even any of [them] to actually see the warrant," even though in that case no warrant was ever procured. *Id.* at 1375. In the second, *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), the court noted that it had not found "any authority" supporting any duty to review the details of the warrant again after the court has issued it. *Id.* at 1029. Notably, in that case the Ninth Circuit explicitly reversed the trial court's conclusion that "clearly established law imposed a duty on the officers, who had generally fulfilled their duty to become informed as to the scope of the warrant, to read or refer to the signed warrant." *Id.* at 1030.

It would be especially unjust, therefore, to deny a defense of qualified immunity in a case such as this one, where the Ninth Circuit authored new law that departed from its own settled precedents and failed even to note the Court's own contrary precedent. The Court has repeatedly admonished the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at

[8] A further indicator of this legal uncertainty is the Court's decision to grant *certiorari* and decide the issue in this case. *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to give it "the definitive answer that it demanded").

562. When the Ninth Circuit last departed from this admonition, this Court summarily reversed, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341). The availability of a defense of qualified immunity is equally clear in this case.

B. Qualified Immunity Protects Officers from Personal Liability in Damages for Making Reasonable Mistakes of Fact.

Because the ruling below fashioned legal principles and imposed legal duties that were not "clearly established" in the law at the time he acted, petitioner is entitled to qualified immunity. *See supra* Part III.A. But had the opinion below been a straightforward application of clearly established law, that still would not end the inquiry here on the applicability of qualified immunity. The Court's precedents make clear that even when officials take actions that violate clearly established law, they do not lose the protection of qualified immunity unless their conduct was objectively unreasonable under the precise circumstances. "What this means in practice is that 'whether an official . . . may be held personally liable . . . generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson*, 526 U.S., at 614 (quoting *Anderson*, 483 U.S. at 639); *see also Saucier*, 533 U.S. at 207.

For example, an officer can have a reasonable though mistaken belief that a warrant contains the necessary level of particularity, and in that situation the Court has found that such conduct does not even violate the Constitution. *See, e.g.*, *Garrison*, 480 U.S. at 85-89. Yet even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable search, this Court's precedents still would operate to grant officers qualified immunity for reasonable mistakes as to the legality of their actions, as when they reasonably misjudge whether probable cause existed to justify

their search. *See, e.g.*, *Anderson*, 483 U.S. at 643; *Malley*, 475 U.S. at 344-45.

The Court has consistently indicated that though it evaluates the officer's actions "in light of" the then-existing "clearly established" legal rules, the overall inquiry remains one of objective reasonableness. *Wilson*, 526 U.S. at 614; *see also Anderson*, 483 U.S. at 641 (officer who "reasonably but mistakenly" concludes that probable cause is established, "like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable"); *Hunter*, 502 U.S. at 228-29 ("Even if we assumed, *arguendo*, that [the agents] erred . . . [they] nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken."); *Saucier*, 533 U.S. at 211 (Ginsburg, J., concurring) ("the question in this case is whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully"). In other words, an officer may not be stripped of qualified immunity for a reasonable error, even if that error results in a violation of a clearly established constitutional rule.

This aspect of the Court's qualified immunity doctrine bears emphasis here, because the Court's most recent decisions in this area have focused more on disputes about "clearly established" law, in situations where the law was arguably unsettled. In this case, the Court should clarify that there are two distinct, albeit related, strands of qualified immunity analysis, and that the objective reasonableness of the officer's conduct remains the centerpiece of the qualified immunity inquiry.

The principle that qualified immunity protects reasonable mistakes of fact as well as violations of unsettled rules of law is clear from the Court's opinions, but it also follows directly from the purposes served by the qualified immunity doctrine. The goal of the doctrine is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier*, 533 U.S. at 202 (quotation omitted). The qualified immunity standard is therefore designed to give "'ample room for mistaken

judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' . . . This accommodation for reasonable error exists because officers should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 343, 341) (citation omitted). Thus, where an officer acts on the basis of a reasonable mistake of fact or, as in this case, makes an innocent proofreading error, the policies that animate the qualified immunity doctrine apply with full force.

1. Qualified Immunity Is Applicable Where, as Here, Petitioner's Actions Would Fall Within the *Leon* "Good Faith" Rule.

This principle is underscored by the Court's holding in *Malley*, which equated the threshold for qualified immunity with the showing necessary to invoke the "good faith" rule that the courts apply in criminal cases. As the Court stated the point:

> Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon, supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. . . . Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon, supra*, at 923, will the shield of immunity be lost.

Malley, 475 U.S. at 344-45. Holding these two standards to be equivalent is sensible for two reasons. First, it eases the practical problems for lower courts to administer all the doctrines and principles of the Fourth Amendment in civil and criminal cases. Second, it allows police to navigate the legal terrain – which is already quite treacherous – with greater simplicity and certainty about what conduct will gain them safe harbor, both in achieving their law-enforcement goals and in protecting themselves against personal liability for carrying out the duties of their job. *See also Leon*, 468 U.S. at 919 n.20 & 922 n.23 (stressing that "the standard of reasonableness we adopt is an objective one," rather than a subjective standard).

It is familiar ground that *Leon* precludes application of the exclusionary rule to evidence obtained by officers who execute a search warrant in reliance on a reasonable mistake. *See, e.g.*, *Leon*, 468 U.S. at 913-25; *Sheppard*, 468 U.S. at 987-91; *Krull*, 480 U.S. at 349-60 (same where reasonable mistake by officer was to rely on statute authorizing warrantless administrative search that was later invalidated). As the Court explained in *Leon*, where an official action is based on a reasonable mistake of fact, the deterrence rationale all but vanishes. *See Leon*, 468 U.S. at 918-20 ("where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . .the officer is acting as a reasonable officer would and should act in similar circumstances") (quotation omitted).[9]

Most notably, the *Sheppard* case, which was the companion case to *Leon*, presented a fact pattern that is virtually identical to petitioner's case. In *Sheppard*, the officer filled out an affidavit which accurately stated that the police wished to search for a number of specific items of evidence in a homicide investigation. Because the suitable warrant form was not available, the officer employed a warrant form that purported to authorize a search for controlled substances, and mistakenly failed to delete a substantive reference to "controlled substance." The magistrate reviewed the form, made changes on it, and then dated, signed, and issued the warrant; however, the magistrate (like the magistrate here) did not change the erroneous entry, and mistakenly advised the officer that the warrant was valid. *See Sheppard*, 468 U.S. at 984-86. The warrant itself did not reference the affidavit. Without again

[9] Significantly for purposes of this case, in *Leon* the Court expressly rejected as speculative and insubstantial the marginal deterrence value that might be thought to flow from suppressing evidence in order to "encourage officers to scrutinize more closely the form of the warrant." *Leon*, 468 U.S. at 928. Thus, to the extent that the Ninth Circuit's rejection of qualified immunity in this case rests on the putative benefits of forcing officers to review judicial warrants for correctness, that rationale would directly contradict this Court's instruction in *Leon*.

reviewing the warrant, the officer proceeded to execute the warrant and gathered the evidence that was specified in the affidavit but not on the warrant form. The defendant was convicted of murder and thereafter challenged his conviction on the ground that the mistake on the face of the warrant violated the particularity requirement. This Court rejected the argument, holding that the exclusionary rule does not apply where the Fourth Amendment is allegedly violated but the officer had an "objectively reasonable basis for [his] mistaken belief." *Id.* at 988. *Cf. Garrison*, 480 U.S. at 85 (where description in warrant of place to be searched was overbroad under the particularity requirement, "we must judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted").

Combined with *Malley*'s rule that the standard for upholding qualified immunity in a civil case is equivalent to the standard for admitting evidence in a criminal case, the holding in *Sheppard* establishes that officers are entitled to qualified immunity where their challenged action is based on a reasonable mistake of fact, such as their reasonable but mistaken belief that the warrant they executed was sufficiently particular. In sum, in cases such as this one, the pertinent question for purposes of determining the application of qualified immunity "is whether there was an objectively reasonable basis for the officers' mistaken belief." *Sheppard*, 468 U.S. at 988.

2. The Defect in This Warrant Does Not Strip Petitioner of Qualified Immunity in Light of His Overall Conduct.

Applying these legal principles to this case, petitioner's defense of qualified immunity should be upheld unless his failure to recognize the mistaken entry on the warrant was objectively unreasonable in light of all the facts and circumstances that confronted him at the time. Under this standard, it is clear that petitioner is entitled to qualified immunity.

First, it is important to underscore the nature of the alleged violation in this case. Unlike other cases in the *Bivens* and *Leon* areas, the conduct at issue in this case amounts to nothing more

than an alleged lack of due care. Petitioner simply made a mistake in preparing the draft of a warrant form for the convenience of the court – a mistake pertaining to a task that was not part of his formal responsibilities and one that the magistrate made as well. In the context of the "rapidly evolving" process of applying for a warrant, *see Saucier*, 533 U.S. at 205, mistakes of this kind are understandable and not unreasonable. *See, e.g.*, *Garrison*, 480 U.S. at 86-89; *Sheppard*, 468 U.S. at 988-990. But in any event, mere negligence is not even the appropriate constitutional standard in evaluating an officer's liability for omissions in the affidavit, much less his liability for omissions in the judicial warrant issued by the court. *See supra* Part II; *Franks*, 438 U.S. at 164-72 (falsehoods or omissions in affidavit do not invalidate a warrant unless they are intentional or made with reckless disregard; allegations of negligence or innocent mistake are insufficient). Errors of this sort – inadvertent, workaday omissions in draft court orders – are not the stuff of which constitutional violations or findings of personal liability in money damages are ordinarily made.

Second, it is undisputed that petitioner set out in his affidavit and warrant application a thorough and accurate basis for searching respondents' ranch. It is also undisputed that he specified to the magistrate with full particularity the items to be seized. These facts readily distinguish this case from cases such as *Leon*, in which the officers were alleged to have acted unreasonably by seeking a warrant based on a showing that no reasonable officer could have believed was sufficient to establish probable cause. Here, by contrast, there is no possible ground for inferring bad faith on the part of petitioner; on the contrary, the record demonstrates that petitioner made a proper showing of probable cause and specified the items to be seized with the requisite particularity. *See* Pet. App. 28a; *see also id.* at 30a-35a (elaborating basis for showing of probable cause).

Third, as explained at greater length in Part I.B, *supra*, the warrant is a judicial order issued by a court upon the proper authority of a neutral magistrate. For the convenience of the court, petitioner drafted portions of the warrant form for the

magistrate to review before issuing the order, but that fact does not alter the constitutional allocation of responsibilities between the court and the officer. *See, e.g.*, *Sheppard*, 468 U.S. at 989 ("Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."); *Garrison*, 480 U.S. at 84 (Warrant Clause erects a prohibition on a judicial officer issuing "any warrant except one 'particularly describing the place to be searched and the persons or things to be seized'"). In contrast to the application and affidavit, with respect to which petitioner acts in his official capacity as a witness and as an official applicant from the executive branch, petitioner's role with respect to the actual preparation of the judicial warrant is ministerial at most, and it would be both inappropriate and deleterious to hold him personally liable for actions that are more properly understood as the legal responsibility of the judicial branch. *Cf. Sheppard*, 468 U.S. at 990-91 ("Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve.").

Fourth, petitioner's generally proficient course of conduct in applying for and executing the warrant provides the backdrop against which the reasonableness of his actions must be judged. *See, e.g.*, *Hunter*, 502 U.S. at 228 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact"). In particular, the thorough justification for the search that petitioner presented in the application for the warrant, and his fidelity to those constraints in carrying out the search of respondents' ranch, negate any inference that his larger course of conduct, including any proofreading error, was unreasonable. *See, e.g.*, *Sheppard*, 468 U.S. at 991 (evaluating reasonableness of overall course of conduct, not simply failure

to review warrant in isolation; "[i]n sum, the police conduct in this case clearly was objectively reasonable and largely error-free").

This point bears emphasis given the lower court's harsh castigation of petitioner (though not of any other agent on the case) on the theory that the "warrant was so facially deficient . . . that had Groh read it, 'he could not reasonably [have] presume[d] it to be valid.'" *See* Pet. App. 10a (quoting *Leon*, 468 U.S. at 923). Thus, as explained in more detail above, *see* Part I.B.2, *supra*, the court of appeals subtly, and improperly, imposed a newfangled duty to proofread the warrant sheet, and then went on to find that petitioner's failure to correct the erroneous entry in the judicial warrant conclusively precluded any defense of qualified immunity. The rigidity of this approach completely ignored petitioner's overall conduct in gathering evidence, applying for the warrant, and executing the search, all of which were tasks that he performed in objectively reasonable fashion. Perhaps more importantly for present purposes, the court of appeals applied an improper and unrealistic "hindsight" analysis to petitioner's action, rather than viewing it in light of all the facts and circumstances relevant at the time of a fast-developing warrant application on the ground. *See, e.g.*, *Garrison*, 480 U.S. at 85 ("we must judge the constitutionality of their conduct in light of the information available to them at the time they acted"); *Saucier*, 533 U.S. at 205 ("police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving").

Indeed, the *post-hoc* approach taken by the court of appeals would likely give rise to liability (or at least defeat the argument for qualified immunity) for almost *any* proofreading error, however inadvertent and understandable it may have been. That is, of course, exactly the sort of dragnet result that the qualified immunity doctrine was designed to prevent. For in hindsight, almost *all* proofreading errors appear to be obvious, often excruciatingly so. Few authors have not had the unhappy experience of sending out a manuscript that was carefully edited and repeatedly proofread, only to discover later a glaring error that in isolation stands out like a sore thumb. That is in the

nature of proofreading errors – they elude attention when made and monopolize it once discovered. It was particularly inappropriate for the court of appeals to subject petitioner to personal liability based on the court's retrospective confidence that the error should have been caught, particularly when there was no suggestion of bad faith and when the error occurred in the drafting of a judicial order intended to aid the court in its own judicial function, rather than as any necessary part of the executive function.

The record in this case shows that the petitioner methodically gathered evidence to establish probable cause; carefully prepared a thorough warrant application; swore out an affidavit that clearly established a legally sufficient basis for a search; sought and received judicial authority to undertake the search; and executed the warrant in a completely professional manner. Far from having been "plainly incompetent" or "knowingly violate[d] the law," *Malley*, 475 U.S. at 341, petitioner's overall course of conduct was responsible, "objectively reasonable and largely error-free." *Sheppard*, 468 U.S. at 990. And under this Court's teachings on qualified immunity, petitioner cannot be subjected to personal liability for money damages merely because of an inadvertent failure to notice an error in a judicial order, even if in hindsight it may appear obvious to an appellate court reviewing the cold record that the error should have been detected.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

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In The

Supreme Court of the United States

JEFF GROH, Special Agent with the Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a search warrant directing the search of a person or place and the seizure of "A single dwelling residence two story in height which is blue in color . . . concealed thereon," satisfies the Fourth Amendment requirement of "particularly describing the place to be searched and the person or things to be seized"?

2. Whether Qualified Immunity protects a federal agent who executes a search warrant so facially deficient that it is nonsensical?

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PROVISIONS INVOLVED

Paragraphs of ATF Order 0 3220.1 relative to the circumstances of this case are the following:

7. Obtaining a Search Warrant.

   d. Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by the magistrate

23. Review of Operational Risk Assessment and Plan, Affidavit, and Warrant

   b. Each person participating in the review of the ATF F 3210.7 shall also examine the warrant and affidavit. If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be postponed until a satisfactory warrant has been obtained.

STATEMENT OF THE CASE

A. The Respondents and their Ministry

Respondents Joseph, Julia, Joshua and Regina Ramirez are members of the Tehinnah Apostolic ministry, a non mainstream religion. They resided on the Moose Creek Ranch in Silverbow County, Montana. Pet. App. 30a. The ministry provides refuge to abused women and children Jt. Apx. 18 which results in outrageous reports to law enforcement from estranged husbands. The Moose Creek Ranch includes several hundred acres. Its buildings,

including the blue two story house, are all readily visible to persons driving by on Interstate Highway 15.

B. The Search Warrant

Petitioner, relying on reports from people whose antipathy against the Ramirezes was apparent even in his application, Pet. App. 34a whose information was as stale as six months, Pet. App. 32a further relying on information from informants whose reliability was unsubstantiated, Pet. App. 35a and included a person with a previous felony charge, Excerpts of Record to Ninth Circuit document 5 (hereinafter ER) and Petitioner even admitting in his application that the automatic weapons fire reported in the area could have come from someone firing an automatic weapon lawfully owned by one of Joseph's friends Pet. App. 31a applied for a warrant to search the Ramirez properties.

Petitioner filled in a warrant form, neglected to state any suspected crime, and described the person or place to be searched as the Moose Creek Ranch, Techinna (sic) Apostolic Fellowship and the thing to be seized as, "A single dwelling residence two story in height which is blue in color and has two additions attached to the east." Pet. App. 28a. The magistrate signed the nonsensical warrant and ordered the application and affidavit sealed. ER 7 p. 4 Petitioner executed the warrant in the company of the sheriff and other officers. The affidavit and application did not accompany the warrant. Pet. App. 15a. Telling Mrs. Ramirez they had a search warrant and they were there "because somebody called and said you have an explosive device in a box" Pet. App. 4a, they searched the house, and other buildings for several hours and found nothing. Jt.

Apx. 21. They photographed the home's interior, recorded serial numbers of legal firearms and left. Jt. Apx. 21. When told the next morning by Ramirezs' attorney that the warrant was defective Petitioner faxed a copy of the front page of the application to the attorney. Pet. App. 16a, 21a. Petitioner later supplemented the "sealed record" with an Attachment B that admitted one informant had in fact been previously charged with a felony reduced to a misdemeanor, rather than a misdemeanor only as stated in his affidavit. ER 4.

C. The District Court Proceedings

March 4, 1999 Ramirezes sued agent Groh (Petitioner), the sheriff and his deputy and several other unnamed officers who participated in the raid in a Bivens action and in an action for violation of 42 USC § 1983. Jt. Apx. 17.

The county defendants appeared and answered. Jt. Apx. 4, ER 6. Petitioner appeared by the US attorney. Each party filed the mandatory initial discovery production. Petitioner then filed his Motion to Dismiss or in the Alternative For Summary Judgement accompanied with his own affidavit. No discovery was undertaken, and the only hearing was an argument on the motion. In that argument the US attorney, as Groh's (Petitioner) counsel, admitted the warrant was defective. Pet. App. 22a n.4. The District Court dismissed the claims against the federal defendants on the basis of no Fourth Amendment violation, Pet. App. 20a-22a and qualified immunity. Pet. App. 22a-24a. A later similar motion resulted in dismissal of the claims against the county defendants. Jt. Apx. 7 #42.

D. The Decision by the Ninth Circuit Court of Appeals

Ramirezes appealed to the Ninth Circuit. The Ninth Circuit upheld the dismissal of the case against all defendants except the Petitioner, but ruled that the Petitioner as the leader of the search, and the person who prepared and served the warrant must bear responsibility for the warrant, so facially defective it violated the Fourth Amendment. The court also, based on its clearly established rule of more than a decade, held that because neither the affidavit nor the application were referenced in and attached to the warrant, Petitioner could not rely on them to obtain qualified immunity. Petitioner's Motion for Rehearing and Rehearing *en banc* was denied July 25, 2002. October 31, 2002 petitioner filed his answer in district court. A petition for rehearing was denied with minor amendments to the panel opinion, and the Petition for *Certiorari* was filed.

SUMMARY OF ARGUMENT

A law enforcement officer who, acting on his own, does not seek assistance of the U.S. Attorney, drafts a facially defective warrant, independently seeks and receives a sealed record of his supporting materials, and receives no specific assurances from the magistrate that the facially invalid warrant authorizes the requested search violates the particularity requirement of the Fourth Amendment when he leads an invasion of the intimate sanctity of a private residence based upon that warrant. Petitioner did these things despite the explicit language of the Fourth Amendment that dictates that "no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV. Petitioner's actions all took place after this Court explicitly stated that depending on the circumstances of the case, the "Good Faith" exception would not apply if the warrant was "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon,* 468 U.S. 897, 922 (1984).

Petitioner knew or should have known that the warrant he drafted was constitutionally infirm. He also knew or should have known that if he wanted to keep the application and affidavit in support thereof under seal, the constitutionally mandated particularized description was required to be within the four corners of the warrant. Failing such a description in the warrant, supporting documents that met the particularity requirement, such as an application and affidavit were required to be attached to the warrant. This was the long-standing rule in the Ninth Circuit. *U.S. v. McGrew,* 122 F.3d 847, 849 (1997).

The Ninth Circuit was correct in denying Petitioner's defense of qualified immunity. Qualified immunity is not available in a case like this where the government official violated "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This Court succinctly defined the issue as "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson*

v. Layne, 526 U.S. 603, 617 (1999) quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citing *Harlow, supra,* at 819).

Petitioner at the time he drafted and sought the warrant should have known that the Fourth Amendment requires that a warrant must particularly describe the place to be searched and the things to be seized, and that absent such a description within the four corners of the warrant the Ninth Circuit required him to attach an affidavit and/or application that satisfied the particularity requirement and receive specific assurances from the issuing magistrate that the warrant was valid despite its overbreadth. Petitioner also knew or should have known that the warrant that he drafted was so facially deficient in failing to particularize the place to be searched and the items to be seized that he could not reasonably presume it to be valid.

ARGUMENT

I. PETITIONER VIOLATED THE FOURTH AMENDMENT BY HIS ACTIONS IN OBTAINING AND EXECUTING THE WARRANT

A. The Specific Language Of The Fourth Amendment Was Violated Because The Descriptions Of The Places To Be Searched And Things To Be Seized On The Face Of The Warrant Were Nonsensical

Petitioner used a fill-in-the-blank warrant form. In so doing he checked both the "on the person" and "on the premises" boxes in describing the person or place to be searched. In the position on the form for description of the

person or place to be searched Petitioner typed in, "Moose Creek Ranch, Techinna (sic) Apostolic Fellowship located off of west frontage road, north of the Moose Creek exit off of Interstate 15 approximately one-half to three quarters of a mile." Following the boilerplate language, " . . . there is now concealed a certain person or property, namely (describe the person or property)," Petitioner typed in, "A single dwelling residence two story in height which is blue in color, and has two additions attached to the east. The front entrance to the residence faces in a southerly direction." No reasonable person could conclude that the above description conformed to the Fourth Amendment's mandate that " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Court stated in footnote 5 in *Massachusetts v. Sheppard,* 468 U.S. 981, 991 (1984) that "[t]he uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." Citations omitted. This Court applied the rules articulated in *United States v. Leon,* 468 U.S. 897 (1984) to find that the "good faith" exception to the exclusionary rule applied. The question of whether or not there was a Fourth Amendment violation was not decided in *Sheppard*. The clear violation was apparent. There must be a Fourth Amendment violation before the exclusionary rule and the "good faith" exception to it are considered. *Sheppard* provides no authority for Petitioner's contention that there was no Fourth Amendment violation. That case involved a specific application of the "good faith" exception to the exclusionary rule. *Sheppard*'s applicability in supporting

Respondents' position and opposing Petitioner's position in this case is discussed in I C.

Petitioner's reliance on *Maryland v. Garrison,* 480 U.S. 79 (1987) that no violation of the Fourth Amendment occurred is misplaced. This Court determined that the constitutionality of the officers' conduct must be judged in light of the information available to them at the time they acted. *Id.* at 85. However, this Court specifically recognized, "In this case there is no claim that 'the persons or things to be seized' were inadequately described or that there was no probable cause to believe that those things might be found in 'the place to be searched' as it was described in the warrant." *Id.* This Court in *Garrison*, refused to suppress evidence where the officers reasonably believed there was only one apartment on the third floor of the building and stopped their search immediately when they discovered two apartments. In this case, Respondents specifically challenge the description of the place to be searched and the things to be seized. Respondents were prevented from challenging any probable cause determination by Petitioner's actions in having the magistrate seal the record.

B. The Application And Affidavit And Any Determination Of Probable Cause Are Irrelevant To A Finding That The Warrant Violated The Particularity Clause Of The Fourth Amendment

The plain language of the Fourth Amendment provides several means of attacking the validity of a warrant. The Fourth Amendment states, " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized." Thus there is a group of four distinct requirements for a warrant to be valid. These are not enumerated as alternatives. Failure of any one element will render a warrant invalid. The warrant drafted by Petitioner did not describe with particularity the place to be searched nor the things to be seized. There is no requirement that Respondents challenge probable cause or whether it was supported by oath or affirmation. The requirements are independent. All must be met to obtain a warrant and the lack of any one alone may invalidate it. The Fourth Amendment does not prioritize these requirements making any one less significant than the others.

Because this warrant did not particularly describe the place to be searched or the things to be seized, the agents examined anything and everything on the ranch. This general search is exactly what the Fourth Amendment was designed to prevent.

Petitioner and *Amici* cavalierly state that probable cause existed simply because Respondents assert that probable cause is irrelevant. Respondents have never conceded that probable cause existed and Petitioner's continual reference to the application and affidavit attempts to distract from the issue of failure to meet the particularity requirement, implying that it is somehow less significant than the other requirements of the warrant clause of the Fourth Amendment.

The application and affidavit were first seen by Respondents and their counsel when they were attached as exhibits to the Motion to Dismiss or in the Alternative For Summary Judgment. Petitioner specifically had the magistrate place the record under seal when the warrant

was issued and thereby prevented Respondents and their counsel access to these documents and any others. Neither Respondents nor their counsel have ever seen an order sealing the file. On March 5, 1997, the day after the search, when Petitioner was told by Respondents' counsel that the warrant was facially invalid, Petitioner faxed the cover page of the Application to counsel.

This case illustrates one of the reasons for the Ninth Circuit rule that if the government wants to keep the application and affidavit under seal, the warrant alone must particularly describe the places to be searched and the items to be seized. The person whose home is being searched has no way of knowing the authority of the agents or the limits of the search. The allegedly sealed documents that appeared with the Motion to Dismiss or in the Alternative For Summary Judgment showed no indication of when they were prepared or what was added after the fact. Particularly suspect is an undated "Attachment B" to Petitioner's Affidavit in Support of Application for Search Warrant. In "Attachment B," Petitioner advises the Court that some facts that he told the Court in "Attachment A" were incorrect, i.e., that one of his confidential informants in fact had in 1994, been charged with a felony that was reduced to a misdemeanor. Originally, in "Attachment A" Petitioner had advised the Court that the informant had been charged with several misdemeanors, the last in 1989. "Attachment B" was an "effort to correct the official record" after the fact. Petitioner altered the "sealed" record after the search.

Neither Respondents nor their counsel were aware that a year and a half after the raid, upon motion of Assistant U.S. Attorney Carl Rostad, the seal was removed by order of Magistrate Cebull. However, the Motion

requested and the Order included a Protective Order prohibiting "any **contact with persons identified in the warrant**" without express written permission of the Court. See Order dated October 1, 1998. [Emphasis in original]. Thus, Respondents while unaware of the removal of the seal, were still prohibited from contacting the informants to test whether Petitioner was lying, exaggerating or otherwise fabricating the information in the affidavit. If informants did say what Petitioner claims they told him, Respondents are precluded by the Protective Order from seeking redress for defamation against the informants. Under Montana law false accusation of a crime is slander. Mont. Code Ann. § 27-1-803 (1999).

Petitioner emphasizes that he faxed the first page of the Application for Search Warrant to Respondents' counsel the day after the raid when counsel pointed out the deficiencies of the warrant. This first page of the application contained no indication that there was probable cause. Respondents and their attorney were no better informed with respect to the basis for the warrant than they were the day of the raid. The fallacy of Petitioner's proposition (Pet. Br. P. 14) that officers conducting a raid of a private residence may orally describe the items to be seized or produce or amend a warrant or affidavit the day after the search is obvious. Such a proposition destroys any assurance to the person whose home is searched that the statements are not altered or supplemented. Such a proposition would destroy all assurance that the matter was reviewed by an independent magistrate prior to the search and upon what information the magistrate's conclusions were based.

Neither Respondents nor any court reviewing the warrant have any way of knowing if indeed supporting

documents were prepared prior to the issuance of the warrant. Attachments A and B are not dated. The "photograph attached" has never been produced in the more than six years since the raid took place. As stated above, Respondents have never conceded that probable cause existed for the issuance of the facially invalid warrant. Respondents' position has always been that probable cause is irrelevant when determining whether or not a warrant complies with the Fourth Amendment's particularity requirement. The Ninth Circuit clearly understood this and never addressed the contents of the application and affidavit with respect to probable cause.

C. Petitioner Is Responsible For The Violation Of The Particularity Clause Of The Fourth Amendment

The fact that a warrant is issued by a magistrate does not excuse independent inquiry into its validity by officers involved in the execution of the warrant. In fact ATF Regulation 0 3220.1 #7, and #23 require such inquiry. A warrant, like the one in this case, "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v. Leon*, 468, U.S. 897, 923 (1984). This Court's statement would have no meaning if the officer had no responsibility as long as a magistrate's signature appeared on the warrant as urged by *Amici* States. *Amici* States' Brief at 17.

The Ninth Circuit followed longstanding precedent in holding Petitioner solely responsible for the violation of the particularity requirement of the Fourth Amendment. The Ninth Circuit's decision in this case is squarely in

agreement with cases it decided prior to the events of this case. Petitioner cites *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986) for the proposition that it is not necessary for officers executing a warrant to actually see the warrant. Pet. Br. at 34 and *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996) for the proposition that there is no duty to read a warrant after it is issued by the Court. Pet. Br. at 34.

Petitioner ignores the Ninth Circuit's recognition of the division of responsibilities among the various participants in this raid. In *Guerra*, INS agents were told by the city Chief of Police that he was obtaining a warrant. In fact he did not obtain a warrant. The city settled the case with plaintiffs prior to trial. The Court did not, nor did it need to, discuss the liability of the Chief of Police. However, it held that the INS officers could rely on the assurances of the Chief of Police that he had obtained a warrant. However, the Ninth Circuit denied qualified immunity because the INS officers had a duty to inquire as to the nature and scope of the warrant. *Guerra* provides no authority that Petitioner in this case can rely upon. Petitioner was the one who sought the warrant here, more like the Chief of Police in *Guerra* than the INS officers. If anything *Guerra* (a 1986 decision), supports the Ninth Circuit's decision in this case that the unnamed ATF agents and the local sheriff's deputies could rely on Petitioner's assurances that he had a valid warrant.

Similarly, *Marks* supports the Ninth Circuit's decision in this case. In *Marks* the Court found that the officers executing the search had fulfilled their duty to become informed by being briefed as to the scope of the warrant being sought, the nature of the criminal investigation, that investigators had substantial evidence that persons at the residences were trafficking in stolen property, and the

nature of the evidence to be seized. Each officer was informed in some way by authorized personnel regarding the scope of the search. *Marks v. Clarke, supra,* at 1030. Those officers were similarly situated to the unnamed ATF agents and the sheriff's deputies in this case. However, the Ninth Circuit in *Marks,* denied qualified immunity to the officers who, like Petitioner here, applied for the warrant. The Court stated:

> We reject the conclusion of the district court that the officers are insulated by qualified immunity because of their reliance on the approval given by an attorney and the magistrate who signed the warrant. We recently noted in *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), that the fact that a warrant was reviewed by two Assistant United States Attorneys and signed by a magistrate does not amount to "exceptional circumstances" on the basis of which a reasonable officer could rely on a facially invalid warrant. *Id.* at 428. We have held that "absent specific assurances from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails." *Id.* at 429. The officers applying for the warrant in this case did not ask for, nor did they receive any such specific assurances from the magistrate issuing the warrant. To the contrary, it appears that the magistrate may have been misled by the terms of the request set forth in the affidavit, and may not have noticed the conflict in the papers submitted to him. Accordingly, we hold that the officers who obtained the warrant authorizing searches of "any person on the premises" are not entitled to qualified immunity for that conduct.

Marks v. Clarke, supra, at 1028. Petitioner in this case is on weaker ground than the officers in *Kow* and *Marks*. He did not rely on assurances of any Assistant United States attorneys. Petitioner drafted the warrant himself. Neither Petitioner nor the officers in *Marks* and *Kow* had "specific assurances from the magistrate" that the warrant was valid. Petitioner knew or should have known that the warrant was overbroad and knew or should have known that controlling authority in the Ninth Circuit required him to seek specific assurances from an impartial judge or magistrate that the defective warrant was valid despite its overbreadth. These cases are consistent with this Court's decision in *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

The facts of *Sheppard* are dramatically different than the facts in this case and others decided by the Ninth Circuit. The issue before the Court was whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. In *Sheppard* the officer prepared the application and affidavit. *Id.* at 984. The application form, when signed by the magistrate would serve as the warrant. *Id.* at 985. He knew he had the wrong form and after the judge reviewed the affidavit and told the officer that he would authorize the search as requested, the officer produced the defective application and warrant form. *Id.* at 986. The officer advised the judge that the form was incorrect and he observed the judge look for a more appropriate form. *Id.* Finding none, the judge told the officer he would make the changes necessary to provide a proper search warrant. *Id.* The judge took the form, made some changes on it, dated and signed it. *Id.* He did not change the substantive portion. *Id.* The judge gave the warrant and affidavit to the applying officer and

specifically told him that the corrected warrant was sufficient authority in form and content to carry out the search as requested. *Id.* These events took place in the home of the judge with the officer present. *Id.* The officer then left with the warrant and affidavit. *Id.* Sheppard correctly applies the rule in *Leon* that the exclusionary rule should not be applied when the officer acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is held to be invalid. The Court in Sheppard concluded the officer had reasonably believed the search was pursuant to a valid warrant. *Sheppard* is consistent with *Leon*'s caveat that, depending on the circumstances of the case, the "good faith" exception would not apply if the warrant was "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Leon,* 468 U.S. 897, 922. The specific factual circumstances in *Sheppard* described above led to the conclusion that the officers acted in objectively reasonable reliance on a warrant issued by a magistrate that was subsequently held invalid. The ruling is dependent on the unique facts. "We hold **only** that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.* at 989, n.6. (Emphasis supplied).

The actions of Petitioner in this case are diametrically opposed to those of the officer in *Sheppard*. The few facts available here about the interaction between Petitioner and the Magistrate are derived from Petitioner's own affidavit in support of the Motion to Dismiss or in the Alternative For Summary Judgement. Petitioner did not have any of his documents reviewed by an attorney. He

recklessly drafted the documents oblivious to his creation of fatal errors including, checking both the box authorizing searches of persons and the box authorizing searches of premises. He described this person and place as the Moose Creek Ranch and typed "A single dwelling residence two story in height which is blue in color and has two additions attached to the east . . . " (ER 1) into the form as the items "concealed" on the ranch. *Id.* He did not point out the errors to the magistrate. He did not watch the magistrate make any corrections. There is no evidence that any corrections were made. The warrant shows no hand written corrections. ER 1. He was not given any specific assurances by word or deed from the magistrate that the warrant authorized the search as requested. There is no evidence that he took the application and affidavit with him to the search. In fact the application and affidavit were placed under seal. "[T]he officer's reliance on the magistrate's probable-cause determination and on **the technical sufficiency of the warrant** he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, at 922-923 (emphasis added, internal citations omitted). In this case the circumstances surrounding Petitioner's application for the warrant clearly establish that Petitioner had no reasonable grounds for believing his warrant was properly issued and his reliance on the technical sufficiency of the warrant he prepared was not objectively reasonable. Unlike the officer in *Sheppard* who made personal efforts to assure the warrant he was requesting was valid, Petitioner in this case acted plainly incompetently. This Court need look no further than its own decisions in *Leon* and *Sheppard* for controlling eighteen year long standing precedent that Petitioner violated

Respondents' Fourth Amendment rights by drafting, obtaining, and executing a warrant that was "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v. Leon,* 468, U.S. 897, 923 (1984).

D. The Ninth Circuit Followed Established Precedent From This Court And The Ninth Circuit And Did Not Create A New Or Novel Proofreading Requirement

As discussed in Section C above, the Ninth Circuit's ruling in this case is consistent with this Court's precedent in *Leon* and *Sheppard* and Ninth Circuit precedent in *Guerra*, *Marks*, and *Kow*. Petitioner as the applicant for the warrant and leader of the search knew or should have known that the warrant he was requesting needed to particularly describe the places to be searched and the things to be seized.

In 1982, prior to this Court's holdings in *Leon* and *Sheppard* in 1984, the Ninth Circuit addressed the particularity requirement. In *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982) the Ninth Circuit recognized that the nature, extent, and circumstances of the criminal activity are, in some respects, relevant in determining the particularity of a warrant. In *Hillyard* the Court was faced with a situation where stolen vehicles were being investigated, and the officers needed to look at serial numbers to see if they were altered and compare them with other records. Of significance to this case, the Court stated:

> The search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein. *In re Seizure of Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1319 (9th Cir. 1981); *The United States v. Klein*, 565 F.2d at 186 n.3.

Hillyard, 677 F.2d at 1340. The challenge to the warrant in *Hillyard* was that the warrant was overbroad because it authorized the search of all vehicles on the premises. The affidavit contained a procedure for determining the status of the vehicles, and the warrant clearly stated that the officers were to seize all vehicles which possessed altered or defaced identification numbers. *Id.* at 1339. Even though *Hillyard* was decided before *Leon* and *Sheppard* the result would be the same because the officer had an objectively reasonable reliance on the warrant; because the warrant itself directed the seizure of all vehicles with altered serial numbers; and because the affidavit was referred to and present, and the affidavit set out .. procedure for verifying serial numbers.

After this Court decided *Leon* and *Sheppard* good faith reliance was guided by those principles. The government began to try and get the Ninth Circuit to adopt a "cure by affidavit" rule. In *Center Art Galleries – Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989) the government attempted to narrow this Court's *Leon* and *Sheppard* analysis, by arguing that the overbreadth of a facially defective warrant was cured by a more particular affidavit (the content of the affidavit was only one factor this Court relied upon in *Sheppard*), or alternatively, that the executing officers had acted in good faith reliance on

the defective warrant. The Ninth Circuit rejected the claim because the warrant in that case did not expressly incorporate the affidavit, the affidavit was not physically attached to the warrant, and the executing officers did not give a copy of the affidavit to the property owner as part of the search. *Center Art Galleries*, *supra,* at 750; *Kow*, *supra*, at 429.

The Ninth Circuit in *Kow*, followed *Leon* and determined that because the warrant was facially invalid, no reasonable agent could rely on it absent some exceptional circumstances. The Court affirmed its previous rule that, "when a warrant is facially overbroad, absent *specific assurances* from an impartial magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails. *Kow*, *supra*, at 429. The government (pushing for a "cure by affidavit" narrowing of *Sheppard*) argued that the officer believed that his affidavit had been incorporated into the warrant and instructed the executing officers to read the affidavit prior to the search. *Id*. The Ninth Circuit rejected the argument.

Four months prior to the Ninth Circuit's decision in *Kow* another Ninth Circuit panel decided *U.S. v. Van Damme*, 48 F.3d 461 (9th Cir. 1995), a case arising out of Montana. The warrant in *Van Damme* did not say what was to be seized. In the place on the form for listing items to be seized the warrant said "SEE ATTACHMENT #1." Nothing was attached. The Court found that on it's face, the warrant was insufficient. *Id*. at 465. Again the government pointed out that there was an attachment to the application describing the items for which the officers were searching. The Court rejected this attempt to adopt a "cure by affidavit" rule because, "[t]he practical significance of not attaching the list of items to be seized was

that, so far as the record shows, the officers had no document telling them what to take, and Van Damme could look at no document specifying what the officers could take." *Id*. at 466. *Leon*, *Sheppard*, *Hillyard*, *Center Art Galleries*, *Kow*, and *Van Damme* were all decided before the raid in this case.

The government's boldest attempt, prior to this case, in pushing for the "cure by affidavit" narrowing of *Sheppard* came in *U.S. v. McGrew*, 122 F.3d 847 (1997). The warrant in *McGrew* failed to specify any type of criminal activity suspected (neither did this warrant) or any type of evidence sought. *Id*. at 848 (nor did this warrant). The warrant referred to an "attached affidavit which is incorporated herein." *Id*. (The printed warrant form here twice used the word affidavit, but no where did it refer to it as attached). The record did not suggest whether the agents brought a copy of the affidavit, but clearly indicated that at no time was McGrew shown nor given a copy of the affidavit, and the government said the agents would never do so for the safety of its cooperating witnesses. *Id*. at 849 The Court recognized its well settled law of the Ninth Circuit that a "search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein." *Id*. (Quoting *Hillyard*, at 1340, internal citations omitted).

McGrew is consistent with *Leon* and *Sheppard*. The Ninth Circuit found that the warrant was defective because it contained absolutely no description of the types of items sought or even the types of crimes for which it sought evidence. The same deficiencies are present here.

The one and only "circumstance" that could apply to a *Leon* and *Sheppard* analysis that the government relied on in *McGrew* was the affidavit that was not attached to the warrant and which the government said it would not disclose to the defendant. Under the circumstances in *McGrew* the Court found, that based on "the clear law of this circuit for more than a decade" *Id.* at 850 n.5 the affidavit could not be relied upon to satisfy the particularity requirement. The Court further stated that the "good faith" exception was not available because there must be an "objective reasonable basis for the mistaken belief that the warrant was valid." *Id.* at 850. (Internal citations omitted). The Court held that there can be no "good faith" reliance on the affidavit's contents if it does not accompany the warrant. There were no other "circumstances" that were offered to the Court comparable to those present in *Sheppard*. No mention was ever made that the officer obtained "specific assurances from an impartial judge or magistrate that the defective warrant was valid despite its overbreadth" as required by the Ninth Circuit since 1995 (*Kow*) and 1996 (*Marks*).

McGrew does not stand for the proposition that an affidavit must be attached to, or accompany a warrant, only that if those criteria are not met the officers are precluded from asserting reliance on the affidavit as evidence of "good faith" or that the warrant met the particularity requirement. The rule in *McGrew* is that if the application and affidavit are not attached they cannot be relied upon as evidence of good faith, nor can they be used to satisfy the particularity requirement. Nothing in *McGrew* prohibits the officer from showing other evidence of "good faith." If the facts were similar to the facts in Sheppard, an officer could show the same diligence

exhibited by the officer in *Sheppard*, i.e., he showed the application to the judge, after the judge told the officer he would issue a warrant authorizing the requested search the officer gave the judge a draft warrant and explained its deficiencies to the judge. The officer watched the judge make corrections and received specific assurances by word and action that the warrant was valid and authorized the search he requested. If the officer then failed to have the attached affidavit he could not rely on its contents to satisfy particularity under the Ninth Circuit's rule, but he certainly could make a case for "good faith," particularly if he had specific assurances by word and action from the issuing judge as required by the Ninth Circuit and as the controlling factor for the decision in *Sheppard*. *McGrew* made no new law nor imposed new requirements on law enforcement officers.

The Ninth Circuit's decision in the present case, *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002) is consistent with precedent from this Court and the Ninth Circuit. The Ninth Circuit was correct in concluding that there was a violation of the Fourth Amendment because the warrant failed to particularly describe the place to be searched and the things to be seized, and because the facial deficiency could not be corrected by the unattached affidavit and application. The Ninth Circuit holding is consistent with goals of the Fourth Amendment as explained by this Court in *Illinois v. Gates*, 462 U.S. 213, 236 (1983). The officers gave Mrs. Ramirez no written assurance that the officers had lawful authority to search her home, or the limits of the search. Nor did Mrs. Ramirez have the opportunity to be on the lookout for the officers overstepping their authority. Because the affidavit and application were "sealed" in the court record and not

attached, not incorporated by reference, not present and not shown to Mrs. Ramirez the Ninth Circuit refused to utilize them to uphold the facially invalid warrant. Since these documents were unavailable to Respondents at the search, they provide no meaningful basis to satisfy the particularity requirement so absent from the facially invalid warrant. The Court also refused to permit the unprecedented "cure by oral assurances of the officer" rule urged by Petitioner. Without seeing the sealed documents at the time of the raid Respondents had no written assurances of the officer's authority or limitations of the search.

If the warrant was present, with the affidavit attached and provided to Mrs. Ramirez it possibly could prevent a Fourth Amendment violation pursuant to dictum in *Sheppard*. As discussed above, this Court never decided the question of whether or not the Fourth Amendment was violated in *Sheppard*. There must have been a violation or there would have been no need to discuss the exclusionary rule and exceptions to it. The sole issue before this Court in *Sheppard* was whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. *Id.* at 988 That issue may have been avoided entirely in that case had the issuing magistrate ". . . crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid." *Id.* at 991, n.7. However, the controlling factor in this Court's decision in *Sheppard* was the reasonable reliance of the officers on the specific assurances of the issuing magistrate. The Ninth Circuit's decision in this case is consistent with Sheppard because the affidavit was not attached or referenced in the warrant and there was no specific assurance from the magistrate.

Thus the warrant is invalid and the particularity requirement of the Fourth Amendment was violated.

The Ninth Circuit did not develop a new requirement to proofread the warrant after it was signed by the magistrate. This Court mandates that "the officer's reliance on the magistrate's probable-cause determination and on **the technical sufficiency of the warrant** he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, at 922-923 (emphasis added, internal citations omitted). In order for the officer to rely on the technical sufficiency of a warrant it is obvious that at some point he must read it. This is discussed further in Section II A below. A proofreading requirement is, however, found in the ATF regulations in force at the time Petitioner conducted the raid in this case. Paragraphs of ATF Order 0 3220.1 relative to the circumstances of this case are the following:

> 7. Obtaining a Search Warrant.
>
> d. Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by the magistrate
>
> 23. Review of Operational Risk Assessment and Plan, Affidavit, and Warrant
>
> b. Each person participating in the review of the ATF F 3210.7 shall also examine the warrant and affidavit. If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be

> postponed until a satisfactory warrant has been obtained.

Petitioner did not follow his own department requirements. He acted in a plainly incompetent manner.

II. PETITIONER IS NOT ENTITLED TO QUALIFIED IMMUNITY

The affirmative defense of qualified immunity does not provide protection to officers who, like Petitioner, act in plain incompetence, or who knowingly violate the law. "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). No reasonably competent officer, on an objective basis, could conclude that the warrant in this case which stated there was a two story blue house concealed on the person or premises of the ranch was valid.

A. Petitioner's Incompetence Is Not Excused By "Greater Incompetence Of The Magistrate"

In Petitioner's Brief section I B, he attempts to place the ultimate responsibility for the facially invalid warrant that he drafted on the magistrate. A "relative incompetence" defense was specifically rejected by this Court in *Malley v. Briggs*, 475 U.S. 335 (1986). This Court stated:

> . . . and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.

Id. at 343 n.9 *Malley's* discussion revolved around a probable cause determination. In this case the incompetence was much clearer. No one could determine from this warrant what things were being sought or the limitations of the search. This warrant never should have been issued. However, Petitioner cannot shirk his sworn duty to uphold, protect, and defend the Constitution by simply placing the blame for his own lack of reasonable professional competence on someone else. His lack of reasonable professional competence is demonstrated by his failure to follow the ATF Order cited in I D above. This Court, seventeen years ago addressed the question of qualified immunity for an officer when the actions of the magistrate were also unprofessional. This Court concluded:

> It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

Id. at 345-346. As noted above, "the officer's reliance on the magistrate's probable-cause determination and on **the technical sufficiency of the warrant** he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, at 922-923 (emphasis added, internal citations omitted). It is self-evident to even the most casual observer that Petitioner failed to read the warrant he typed, and likewise the magistrate did not read it within any range of professional competence before he signed it. Petitioner also failed to "be sure that a warrant is sufficient on its face even when issued by the magistrate." ATF Order 0 3220.1 ¶ 7.

B. Petitioner Violated Clearly Established Law

Petitioner correctly asserts that qualified immunity shields officers from damage suits unless their conduct violates "clearly established" constitutional rights which a reasonable person would have known at the time of the events in question. Pet. Br. at 26. (citations omitted). The question is whether the right is clearly established, not whether various courts around the country agree upon an exception to that right or an excuse for law enforcement to ignore it. Petitioner knew or should have known in March of 1997 that any warrant he wished to serve must describe with particularity the places to be searched and the things to be seized. The plain language of the Fourth Amendment has demanded this since its ratification in 1791. See also *Guerra v. Sutton*, 783 F.2d 1371, 1375 n.4 (9th Cir. 1986). "For example, the law was clearly established that warrants must particularly describe the things to be seized,

see, e.g., U.S. Const. Amend. IV." At the time he applied for the warrant, Petitioner also should have known the importance of the particularity requirement that "a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977) abrogated on other grounds, *California v. Acevedo*, 500 U.S. 565 (1991); *Illinois v. Gates*, 462 U.S. 213, 236 (1983). He should have known that a warrant, like the one in this case, "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v. Leon,* 468, U.S. 897, 923 (1984). He should have known that in the Ninth Circuit, "absent specific assurances from an impartial judge or magistrate that the defective warrant is valid despite its over-breadth, a reasonable reliance argument fails." *United States v. Kow*, 58 F.3d 423, 429 (9th Cir. 1995); *Marks v. Clarke,* 102 F.3d 1012 (9th Cir. 1996). Petitioner has not claimed that he did not know or could not have known any of these specific principles of Fourth Amendment jurisprudence.

Petitioner's claim of constitutional uncertainty is aimed solely at the Ninth Circuit's refusal to relax the particularity requirement of the warrant clause of the Fourth Amendment by not recognizing the application and affidavit that were not incorporated by reference or attached to the warrant and had been kept under Court seal. The Ninth Circuit did indicate that it would look beyond the four corners of the warrant to the affidavit only if it is referenced in and attached to the warrant. The Ninth Circuit has been willing to do that "for over a decade."

McGrew at 850 n.5. *McGrew* established no new law in the Ninth Circuit. It collects a group of precedent cases establishing a rule which it describes as " . . . a long line of the circuit's clearly established Fourth Amendment precedent" *Id.* at 849; "The well settled law of this circuit . . . " *Id.* at 849; and " . . . the clear law of this circuit for more than a decade, foreclosing any 'reasonable belief' to the contrary." *Id.* at 850 n.5. The fact *McGrew* was decided after the raid here occurred is of no benefit to petitioner's claim of qualified immunity because, as explained in part I D above, *McGrew* encapsulates, analyses, and is based upon over 14 years of precedent in the circuit together with precedent from this Court. Petitioner attempted to distinguish *McGrew* before the Ninth Circuit on the basis of the immaterial fact the government refused to provide the defendant McGrew with the supporting affidavit and application for a period of several months after the search. Pet. Brief to Ninth Circuit 26. *McGrew* reversed the district court because of lack of particularity in the warrant, not on failure to disclose information to the defense. Law enforcement officers in the Ninth Circuit have repeatedly failed or refused to either abide by the plain language of the particularity requirement of the warrant clause of the Fourth Amendment or follow the Ninth Circuit's relaxed standard method for supplementing a facially invalid warrant. The question is not whether the relaxed standard was "clearly established" at the time Petitioner acted. The question is whether the constitutional right that a warrant particularly describe the persons and places to be searched and the things to be seized was "clearly established."

> "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*, at 640 (internal citations omitted); see also *United States v. Lanier,* 520 U.S. 259, 270 (1997).

Wilson v. Layne, 526 U.S. 603, 614-615 (1999).

The particularity requirement is one of the most explicit rights in the constitution. It is much more specific than, and subject to much less interpretation than, "Due Process," "Equal Protection," or even "Probable Cause." Any reasonably trained ATF agent should be able to recognize that this warrant was nonsensical on its face. The record is void of any claim that the warrant made sense on its face. It was objectively unreasonable. The total lack of any action on the part of Petitioner to assure that he had a facially valid warrant indicates that he acted completely incompetently. He could not have objectively reasonably relied upon the warrant. In order to uphold the actions of Petitioner, this Court would have to adopt what Justice Brennan referred to as "the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." *U.S. v. Leon*, 468 U.S. 897, 955 (1984) (Brennan Dissent) and hold that qualified immunity protects the plainly incompetent. This Court must recognize that the Fourth Amendment protects innocent persons who have no exclusionary rule remedy.

CONCLUSION

For the aforementioned reasons, this Court should affirm the Ninth Circuit's decision and hold that under the circumstances of this case Petitioner violated the "clearly established" rights of Respondents by executing a facially nonsensical warrant that no law enforcement officer could have objectively relied upon, and that Petitioner is not entitled to qualified immunity as a matter of law. This case should be remanded to the District Court for trial only on the issue of damages.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2003

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

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REPLY BRIEF FOR PETITIONER

This case poses three questions. Did petitioner violate respondents' constitutional rights? Can he be held personally liable for lack of due care? Is he entitled to qualified immunity? If petitioner prevails on any issue, he must be dismissed from this civil action; here, he rightfully should prevail on them all.

I. PETITIONER DID NOT VIOLATE THE FOURTH AMENDMENT IN THIS CASE.

Respondents' brief is notable for the points they either acknowledge or fail to contest. *First*, they do not deny that the record — taking as true the allegations in the complaint — is devoid of any indication of bad faith on petitioner's part in any respect pertinent to the issues raised before this Court. As the District Court correctly noted: (i) the particulars of the description provided in the warrant application were accurate and adequate; (ii) the officers participating in the search were well aware of the items they were looking for and looked only for those items; (iii) plaintiffs themselves knew what items the officers sought based on the officers' verbal description at the scene; and (iv) petitioner faxed them the relevant portions of the application "showing the correct description of items to be seized, when he was notified of the mistake." Pet. App. 21a. *Second*, respondents agree that a neutral, independent magistrate reviewed the application and supporting materials, expressly approved the warrant based on a finding of probable cause, issued a judicial order to that effect, and ordered the supporting materials to be sealed. *See* Resp. Br. 2. *Third*, respondents do not dispute that petitioner executed the search consistent with all the particulars presented to the magistrate in the application materials. What remains after these concessions is a few arguments aimed at persuading the Court that the ruling below was neither novel nor flawed. In fact, it was both.

A. The Purposes of the Particularity Requirement Were Fully Satisfied.

This case is based on an omission that occurred in the specific wording of this warrant — a proofreading error, made

in good faith, that escaped the attention of both the magistrate and the officers. *See, e.g.*, Pet. App. 23a. Yet, as the United States explains, *see* U.S. Br. 12-16, this defect in particularity does not rise to the level of a constitutional violation, which is judged under the standard of reasonableness in the totality of the circumstances, *see, e.g.*, *Segura v. United States*, 468 U.S. 796, 806 (1984). Although the warrant here did not list the items to be seized, at the time that petitioner and the other officers executed the warrant and entered the Ramirez home, they orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See* Pet. App. 15a. This description accorded with the particulars that petitioner had already specified to the court in the original warrant application and supporting affidavit. These facts are undisputed. *See id.* The officers also left the warrant with Mrs. Ramirez, and the next day, upon request from respondents' attorney, petitioner faxed him the page of the application that contained the full list of items to be seized. *See id.* at 15a-16a. In these circumstances — where the warrant was based on probable cause and was backed by an application containing a sufficient description of the specific items to be seized, where the property owners were fully appraised of the objects of the search, and where the officers were acting in good faith — petitioner's conduct was plainly reasonable and therefore did not violate the Fourth Amendment. *See, e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987) (officers acted reasonably in executing a warrant that appeared valid when issued, but turned out to be overbroad, so they did not violate Fourth Amendment); *cf. Hill v. California*, 401 U.S. 797, 803-04 (1971) (warrantless arrest of wrong man based on reasonable mistake of fact did not violate Fourth Amendment).

In addition, the purposes of the particularity requirement were fully satisfied in this case. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (particularity requirement protects persons against "a general, exploratory rummaging in a person's belongings"); *Stanford v. Texas*, 379 U.S. 476, 481 (1965) (general warrants were the "worst instrument of arbitrary power . . . because they placed the liberty of every man in the

hands of every petty officer") (quotation omitted); *Garrison*, 480 U.S. at 84 ("The manifest purpose of this particularity requirement was to prevent general searches."). Petitioner completely and accurately documented the objects of the proposed search in the warrant application and affidavit he submitted to the court. *See* Pet. App. 28a-35a. The search was in fact limited to these parameters, and the courts were in a position to monitor and redress any variance from them in the actual search. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 564-66 (1976) (checkpoint stops are permissible even without judicial blessing because their reasonableness turns on factors like location that are available for "post-stop review").

Certainly it is important to avoid flaws in warrants wherever possible, but mistakes are made, and the constitutional question here is whether such mistakes inevitably render the ensuing conduct unreasonable *per se* under the Fourth Amendment. The Court has rejected that view. *See, e.g.*, *Garrison*, 480 U.S. at 84-89 (particularity defect did not cause ensuing search to violate Fourth Amendment); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 n.7 (1984) (particularity defect unimportant where, as here, "if the judge had crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid").

The court of appeals ignored these considerations, as well as longstanding circuit precedent on the purposes served by the particularity requirement. In *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982), then-Judge Kennedy explained that this requirement "guards the right to be free from unbounded general searches. The central protection has been stated as insuring that 'nothing is left to the discretion of the officer executing the warrant.'" *Id.* at 1339 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). This core point, entirely absent from the ruling below, underscores why petitioner's actions here in no way undermined the constitutional command. It is undisputed that petitioner, far from undertaking a general search, hewed strictly to the parameters as determined by the magistrate and advised respondents of the specific items whose

seizure had been authorized. *See* U.S. Br. 16 ("petitioner, in executing the warrant, was just as constrained by the magistrate judge's probable-cause determination as he would have been if the warrant form had been completed correctly"). As for respondents' suspicions to the contrary, the appropriate venue for testing them is later in a court of law, and the particularity requirement should not be construed as a means of achieving citizen control over officers at the scene. *See id.* ("Petitioner's execution of the warrant could be challenged in court on the basis of the information given in the warrant application."). In sum, the brand-new proofreading rule fashioned below in this case in no way serves the purposes behind the particularity requirement as explained in *Hillyard* and the Court's own prior decisions.

In this case, it was objectively reasonable for petitioner to assume, without stopping to reconfirm, that the judicial warrant issued by the court authorized the search in accordance with the terms of his application. The Court has explicitly addressed this issue elsewhere and held that it was reasonable for "the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and . . . had good reason to believe that the warrant authorized the seizure of those items" to act on that basis. *Sheppard*, 468 U.S. at 989 n.6. As the Court put the point: "We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.*

Respondents take a markedly different view of the constitutional directive, asserting that the particularity requirement is a theoretical absolute, and hence the Fourth Amendment can never be satisfied when a warrant is executed and later is shown to be erroneous on its face. Under this rigid approach, any material misnotation — such as a transposition of numbers in the homeowner's address — would violate the Constitution.

Similarly, the court below opined that if petitioner had rechecked the warrant after the magistrate had issued it, he "would surely have realized" the facial defect. Pet. App. 10a.

But the court did not explain its certainty that petitioner would have discerned the problem when in fact the magistrate had not done so, nor had any other reviewing official within ATF. More importantly, the court's blithe presumption failed to heed this Court's repeated admonitions that the conduct of officers must be evaluated with a view to the actual constraints and demands that law enforcement officers face in the field. *See, e.g.*, *Elkins v. United States*, 364 U.S. 206, 222 (1960) ("it can fairly be said that, in applying the Fourth Amendment, this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement"). Petitioner had dozens of discrete responsibilities as leader of a federal-state-and-local search team to be sure that this search was carried out safely, effectively, and with a minimum of disruption to the homeowners. He had, moreover, to complete his own extensive affidavit and application, which actually supplied the basis for the magistrate's determination in this case, and which required him to testify under penalty of perjury. Given this long list of duties with respect to this single case (only one of many for which he was responsible at the time), it is ironic that the court of appeals transferred to petitioner alone the ultimate responsibility, on pain of personal liability in money damages, for seeing to it that the subsequent *judicial* order was issued error-free. *See, e.g.*, *Sheppard*, 468 U.S. at 989 (rejecting argument that the officer "should have examined [the warrant] to make sure that the necessary changes had been made").

Respondents attempt to bolster their position by citing an internal agency policy that they claim was violated in this case when petitioner failed to proofread the warrant again after the court had issued it. *See* Resp. Br. 1 (quoting ATF Order 0 3220.1); *id.* at 25-26. Yet that policy is useless to respondents, for four reasons. *First*, the Court has squarely held that no action will lie under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for alleged violations of a mere regulation or policy. *See Davis v. Scherer*, 468 U.S. 183, 195-96 (1984) (it would be unfair and unwise to hold officials personally liable for possible violations of "a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can

only comply with or enforce them selectively") (quotation omitted). *Second*, the ATF's internal policy "directive" is not intended to be enforceable in court, as it merely "provides basic information and procedures to be followed" that fall far short of constitutional imperatives. ATF Order 0 3220.1(1); *see also id.* (25)(c)(3) (directing the search team not to smoke, eat, or drink at the search premises).

Third, it is dubious whether petitioner even violated this ATF directive at all, since the "independent examination" of the warrant and affidavit described in paragraph 23 is directed not to petitioner but to his superiors, who were obliged to conduct a careful review of those materials before giving their approval to the operation. *See id.* (23)(a)-(b). It is also doubtful whether petitioner violated ATF Order 0 3220.1(7)(d), insofar as he did not exceed his authority in executing the warrant and sought to make sure that the search warrant was sufficient by personally filling out the warrant form and supporting materials, even though he knew it would ultimately be "issued by the magistrate" and reviewed by his superiors. *Id.*

Fourth, this provision of the policy actually undercuts respondents' arguments, because it shows a careful and realistic concern that officers who inevitably must labor amidst the bustle and confusion of everyday law enforcement will occasionally make mistakes. By providing a multi-layer review of the warrant for "any error or deficiency," *id.* (23)(b), the ATF sought to cull out improper warrants, including those with flawed transcriptions. As this case demonstrates, however, even the most elaborate procedures may not succeed in eliminating errors entirely. And although many defects seem obvious in hindsight, again the Court has "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Garrison*, 480 U.S. at 87; *see also Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990) ("we have not held that 'reasonableness' precludes error with respect to those factual judgments that law enforcement officials are expected to make."); *Hill*, 401 U.S. at 804-05 ("When judged in accordance with 'the factual and practical considerations of everyday life on

which reasonable and prudent men, not legal technicians, act,'" such conduct was "reasonable and valid under the Fourth Amendment.") (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (Rutledge, J.)).

It thus was inappropriate for the court of appeals to impose on petitioner the responsibility for ensuring the technical soundness of the work of the judicial officer. Of course it may often be sensible for an officer to scrutinize a warrant even after it has been approved, but it is neither sensible nor fair to saddle officers with personal liability for technical defects in the judicial orders they are empowered only to execute. *Cf. United States v. Bonner*, 808 F.2d 864, 867 (1st Cir. 1986) ("the responsibility for the inadvertent omission of the address on the warrant itself must be borne by the magistrate as the final reviewing authority."); *United States v. Curry*, 911 F.2d 72, 79 (8th Cir. 1990) (same).

B. The Fourth Amendment Requires Supervision of Officers by Courts, Not by Those Searched.

The court of appeals expressly grounded its interpretation of the particularity requirement on the importance of empowering citizens to "be on the lookout and to challenge officers who might have exceeded the limits imposed on them by the magistrate." Pet. App. 7a. Respondents champion the same theme, suggesting that the Fourth Amendment requires officers to provide a written (not oral) description of the items to be seized so that the property owner can be personally assured of the precise basis and scope of the magistrate's determination. *See, e.g.*, Resp. Br. 9-12.

Respondents seriously misconstrue this constitutional provision. The Fourth Amendment mandates that the initiation and execution of government searches and seizures are to be judged according to a "reasonableness" test and that judicial oversight, even though not required in all instances, should be invoked whenever practicable as the fundamental supervisory check on such action. Indeed, as we discuss further below, the Constitution *does not* require that the target of the search be given a copy of the warrant before the search is executed, and

in some instances the government is not even obliged to inform the target that a search ever occurred.

Accordingly, the court of appeals was simply incorrect when it asserted that the Fourth Amendment is designed to enable the target of a search to engage in contemporaneous self-help, acting to supervise officers who execute a warrant by "challeng[ing] them" and "policing the officers' conduct." Pet. App. 7a. To the contrary, the Fourth Amendment works through the judicial process, not through confrontations between citizens and law enforcement. It is designed to provide a prior neutral check on the officers' authority and a clear record that permits later recourse to the courts to redress any wrongdoing, policed in both instances by the independent judiciary.

Indeed, the approach urged by the court of appeals has no basis in the text of the Constitution or the precedents of this Court, and it promises to be disastrous as a policy prescription. It is of course vital for officers not to overstep the lawful limits of their authority, and desirable that citizens should zealously safeguard their constitutional rights. But the conscious design of our constitutional system is that citizens should do so by invoking legal processes, not in uncontrolled faceoffs with government officials in the frenetic and potentially hazardous flashpoint of an official search. In a healthy constitutional democracy, the tree of liberty should not be refreshed with the blood of patriots and tyrants, as Jefferson urged, but rather tended by the rule of law.

There are sound reasons for this approach. Performing a search of persons or premises for evidence of crime, contraband, or evidence material to a criminal investigation is unavoidably dangerous. Officers are given considerable discretion in deciding how to proceed in carrying out this task: they can decide in many instances not to apply for a warrant at all, *see, e.g., Warden v. Hayden*, 387 U.S. 294 (1967); they can seize additional evidence of crime if it is exposed in plain view, *see, e.g., Coolidge*, *supra*; and they can make reasonable judgments about the amount of force that must be used to subdue

individuals as needed, *see, e.g., Graham v. Connor*, 490 U.S. 386 (1989). Searches routinely involve the unwelcome entry of property, frequently in the dead of night, without any certainty or predictability about where armed criminals may be located and how they may react to the intrusion. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 606-07 (1999) (describing factual background of search); *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (discussing "legitimate law enforcement interest" in "minimizing the risk of harm to the officers" because "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence"). During the course of the search itself is not the time for lengthy give-and-take with the property owner about the precise details of how the search is to be implemented, because the distraction and disruption that would ensue could unreasonably interfere with the officers' safe and competent performance of their duties at the scene. As this Court has emphasized: "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03.

The court below recognized this key point in its earlier opinion in *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982). Explaining the appropriate remedy for a violation of the particularity requirement, then-Judge Kennedy wrote that "a search warrant authorizing inspection will not be a general warrant if such standards reasonably guide the officers in avoiding seizure of protected property, and if upon return of the warrant the magistrate may review the search to determine whether the instructions were followed and legitimate property and privacy interests were protected." *Id.* at 1340. By contrast, the vision of the court below in this case, echoed by respondents here, virtually invites Waco-like confrontations with officials who are executing presumptively proper judicial commands.

Moreover, under respondents' extreme view, law enforcement officers' compliance with Fed. R. Crim. P. 41, which is routine, would be flatly unconstitutional. *See* U.S. Br. 17. Rule 41(f) concerns the execution and return of a warrant, and it specifies that the officer executing the warrant either must

"give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken," or must "leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(3) & (4). This measure does not require that the officers provide a copy of the warrant to the target *before* or *during* the search. In fact, officers have evolved a common practice of providing a copy of the warrant at the *end* of the search, as they are preparing to leave the premises, which is the earliest point at which they are ready to produce a final receipt for all property taken. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 356 n.16 (1967) ("Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place."); *City of West Covina v. Perkins*, 525 U.S. 234, 236 (1999) ("*At the conclusion of the search*, the officers left respondents a form entitled 'Search Warrant: Notice of Service'") (emphasis added); *id.* at 242 (rejecting Ninth Circuit's "far-reaching notice requirement," which "not only lacks support in our precedent but also conflicts with the well established practice of the States and the Federal Government").

The courts also have refused to impose an immediate-notification requirement on law enforcement officers as a constitutional matter. As Justice Thomas recently noted, though this Court has "never addressed the issue, there is near unanimous agreement among the lower courts that the notice requirements imposed by Federal Rule of Criminal Procedure 41(d) . . . are not required by the Fourth Amendment." *Perkins*, 525 U.S. at 246 n.1 (1999) (Thomas, J., concurring); *see also Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment* § 4.12 (3d ed. 1996 & Supp.) (citing cases).

Indeed, in some instances of so-called "sneak and peek" warrants, the target of the search does not receive notification that any search has occurred for some time afterwards, if at all. The courts have upheld such warrants where a satisfactory showing is made that notice of the search would be likely to

compromise an ongoing criminal investigation. *See, e.g.*, *United States v. Villega*, 899 F.2d 1324, 1337 (2d Cir. 1990). This Court has likewise upheld, for decades, the constitutionality of search warrants to conduct wiretaps and other forms of electronic surveillance, without notice to intended targets. *See, e.g.*, *Katz*, 389 U.S. 354-55 (stating that electronic surveillance can be conducted pursuant to a valid warrant without notice); *Dalia v. United States*, 441 U.S. 238, 246-48 (1979) (upholding covert entries to install electronic bugging equipment that is otherwise legal, pursuant to a warrant).

Respondents' complaints about the fact that the supporting documentation for the warrant was sealed in this case by order of the magistrate are similarly misplaced. Respondents contend that the sealing order undermines core values under the Fourth Amendment by preventing the homeowners from knowing at the time of the search, and thus being able to challenge at the scene, the authority of the agents and the specific limits on the search. *See* Resp. Br. 9-11. At the same time, respondents dismiss as constitutionally irrelevant the undisputed fact that petitioner in good faith gave respondents an accurate oral description of the nature of the search and the items to be seized. *See* Pet. App. 15a. Ultimately, respondents seek to leverage the sealing of the supporting materials to justify a rule of strict liability for errors discovered later on the face of the warrant.

Here again, respondents' argument rests on a fundamental misunderstanding of the realities of federal law enforcement. In fact, sealing of materials supporting judicial warrants is routine. Typically, the application, affidavit, and warrant returns remain sealed at least until criminal charges are initiated and often even longer, unless they are requested and produced in discovery in subsequent civil litigation. This nearly universal practice is not a matter of official caprice, but of sound experience. First and foremost, making the materials public would invariably prejudice an ongoing criminal investigation, since the information set out in a well-prepared affidavit usually details the course of the entire investigation, including key witnesses and evidence that the government is seeking to develop. Second, the application and affidavit are sealed to protect witnesses and other third

parties whose identities and divulgences may be revealed, which could place them in grave danger. Third, these materials are ordinarily sealed in order to protect the reputation of innocent persons, including the targets themselves, who may never be charged with a crime. Sealing also helps minimize the chances of an on-the-scene challenge to the nature and scope of the search, which would jeopardize the safety of homeowner and officer alike. In sum, the Fourth Amendment is designed to provide a before-and-after check on the officers' authority by the judiciary rather than a contemporaneous check by the target of the search, and the standard procedure of sealing the relevant documents is entirely consistent with that.

C. The Fourth Amendment Does Not Require Officers to Proofread Judicial Warrants Issued upon a Proper Finding of Probable Cause.

Respondents' brief fails completely to come to grips with the novel proofreading requirement that the court of appeals imposed on petitioner alone as the leader of the search team. Remarkably, respondents attempt to argue that the requirement was already well-established under the decisions of *this* Court. Accordingly, respondents do not dispute that the Ninth Circuit imposed a requirement to proofread the magistrate's work, but suggest that such a requirement is actually "mandate[d]" by this Court's opinion in *United States v. Leon*, 468 U.S. 897 (1984). *See* Resp. Br. 25.[1]

Thus, respondents' argument is that the proofreading requirement exists in the Fourth Amendment and, moreover, is not at all "new." This is nonsense. As petitioner set out in his opening brief, *see* Pet. Br. 20-22, this Court in *Sheppard* plainly rejected the contention that officers have a general duty to go back to review a judicial warrant after the court had issued it, *see* 468 U.S. at 989 ("we refuse to rule that an officer is

[1] Respondents immediately undercut this argument by invoking the ATF's internal policy directive, which – apart from creating no judicially enforceable remedy, much less any well-established constitutional right, *see supra* Part I.B – would have no force whatsoever if *Leon* actually established the proposition of constitutional law that respondents aver it does.

required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested"); *see also Illinois v. Krull*, 480 U.S. 340, 349 (1987) ("the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it"). That is particularly true where the officers involved in the search were the ones who had specified its scope to the magistrate, as was is true in both *Sheppard* and this case. *See Sheppard*, 468 U.S. at 989 n.6 (because the officer who directed the search "knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items" it was "not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested"). Of course, under the general reasonableness analysis of *Leon* and *Sheppard*, there may be unusual circumstances in which it would not be reasonable for an officer to simply assume the constitutionality of a judicial warrant, but that is a far cry from the general proofreading obligation that the court of appeals imposed in this case and would presumably impose in all other cases. Nonetheless, as explained above and in greater detail in our opening brief, neither petitioner's good faith nor the overall reasonableness of his conduct in executing the search warrant can fairly be called into question here.

II. PUBLIC OFFICIALS ARE NOT LIABLE FOR CONSTITUTIONAL VIOLATIONS BASED ON AN ALLEGED LACK OF DUE CARE.

Respondents never even address petitioner's contention that the Court's precedents foreclose the imposition of civil liability on public officials based on an alleged lack of due care, as is asserted here. *See* Pet. Br. 22-25. This rule has been given general application in cases involving such diverse constitutional provisions as the Due Process Clause, *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986), the Equal Protection Clause, *see, e.g.*, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and the Eighth Amendment, *see, e.g.*, *Estelle v.*

Gamble, 429 U.S. 97 (1976). Justice Brennan articulated the rule in general terms, noting that "to prevail in any *Bivens* action, recipients such as respondents must both prove a deliberate abuse of governmental power, rather than mere negligence." *Schweiker v. Chilicky*, 487 U.S. 412, 447 (1988) (Brennan, J., dissenting) (citing *Daniels*).

The Court has spoken in the same terms about the Fourth Amendment: "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). And the Court applied this approach in *Franks v. Delaware*, 438 U.S. 154 (1978), where it held that in any challenge to a falsehood or omission made by an officer applying for a warrant, "allegations of negligence or innocent mistake are insufficient." *Id.* at 171.

Franks is controlling here, for this lawsuit is premised most fundamentally on petitioner's inadvertent failure to proofread the warrant and thus is not a proper *Bivens* action at all. If officers cannot properly be held liable under the Fourth Amendment for a mere lack of due care, then this lawsuit cannot proceed and the *Bivens* claim brought against petitioner in his personal capacity must be dismissed.

III. PETITIONER IS ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY IN THIS CASE.

There are two distinct bases for qualified immunity in this case and on each the applicable legal test is dictated by the Court's precedents. First, government officials are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g.*, *Wilson*, 526 U.S. at 609-10; *Anderson*, 483 U.S. at 641. Second, officials are immune from suit if they have made a reasonable mistake of fact, unless their conduct "is outside the range of the professional competence expected of an officer." *Malley v. Briggs*, 475 U.S. 335, 343 n.9 (1986); *see also*

Saucier v. Katz, 533 U.S. 194, 205 (2001). Petitioner is entitled to qualified immunity here under either prong.

A. If Petitioner's Conduct Was Unlawful, It Was Not Apparent in the Light of Preexisting Law.

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. Respondents neatly circumvent this rule by arguing that the Fourth Amendment has been on the books since 1791, including the particularity requirement, and so any violation of this provision is necessarily a violation of "clearly established" law. *See* Resp. Br. 28-29.

The Court rejected essentially this same argument in *Anderson*. There, as here, the plaintiff claimed that the Fourth Amendment had been violated, and the Court noted that the operation of the qualified immunity doctrine "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." "For example," the Court continued, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation." *Anderson*, 483 U.S. at 639. If this were the test, the Court noted, plaintiffs would be able to "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights," thereby destroying the doctrine of qualified immunity. *Id.*; *see also Saucier*, 533 U.S. at 201-07 (alleged right must be formulated "on a more specific level"); *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (same). The Court thus required much more precision in framing such claims.

The same deficiency exists here. Respondents essentially claim that petitioner violated the particularity requirement of the Fourth Amendment, without more. That position, however, fails to do justice to the real issues here. Certainly petitioner can

be charged with knowledge and responsibility for compliance with something as fundamental as the Fourth Amendment. But to recognize that he would be violating the law in this particular situation would have required him to anticipate that the court of appeals would announce a new rule requiring all officers to proofread warrants after they had been approved and issued by a magistrate — a legal issue that remains far from clear to this day. He also would have had to foresee a court ruling someday that a defect found on the face of the warrant cannot be corrected on the spot by orally briefing the property owners about the precise details of the authorized search — a new regime not made clear until this case was decided below. And finally, he would have had to prefigure that a warrant which refers to the underlying affidavit information provided to the magistrate cannot be supplemented by reference to that documentation, still an issue that is hotly controverted among the circuit courts. *See, e.g.*, Pet. Br. 31-34. Only by coming to grips with these types of questions can the constitutional issue be made more concrete "in light of the specific circumstances that the official confronted at the time he or she acted." *See Anderson*, 483 U.S. at 640-41; *see also* Pet. Br. 28-29.

To arrive at an appropriate level of specificity, therefore, would have required petitioner to predict the future course of the law on three distinct constitutional issues, some or all of which may be decided definitively for the first time in this case. In this procedural posture, an official such as petitioner "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Furthermore, the Ninth Circuit's ruling here relied on *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), to foreclose petitioner's defense of qualified immunity. The trouble is that Judge Reinhardt's opinion in *McGrew* was not issued until more than six months *after* this search warrant was executed, which disqualifies it as an available precedent on which to base a denial of qualified immunity. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 533-35 (1985); Pet. Br. 29-31.

Recognizing the difficulty, respondents claim that the timing of *McGrew* is immaterial because that subsequent decision "encapsulates, analyses, and is based upon over 14 years of precedent in the circuit together with precedent from this Court." Resp. Br. 30. But their rationale is problematic. First, if taken to its logical extreme, this view would eliminate entirely the "prior-subsequent" dichotomy that this Court has been so careful to build into the qualified immunity doctrine ever since the *Mitchell* case almost two decades ago. As Justice Holmes once observed, virtually every precedent can lay claim to having been based on some set of prior decisions, advancing in "molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Very few decisions represent undeniable leaps on the path of the law.

Moreover, if it were true that *McGrew* did not extend prior precedent, then it should be possible to cite other decisions, predating the events of this case, as a basis for identifying "clearly established" law. But the most pertinent decision in the Ninth Circuit prior to these events was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's conviction, based on that court's most informed interpretation of the controlling Ninth Circuit precedents extant at the time. *See McGrew*, 122 F.3d at 848-49.

Respondents do make a vigorous attempt to repair the breach left by the court below, citing a half-dozen other Ninth Circuit rulings in an effort to forge a foundation of "clearly established" law here. But that pattern of decisions is no more than a patchwork quilt, at best. It is revealing, moreover, that respondents have sidestepped any discussion whatsoever of two other cases addressed in petitioner's opening brief — *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993), and *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988). Both of these cases were explicitly receptive to providing relief for officers in cases where warrants were found to be insufficiently particular but information from the underlying affidavits could be used to supply the deficiency. *See* Pet. Br. 31-32 (discussing the inconsistent pattern of the Ninth Circuit's decisions in this area,

including its decisions in *Hillyard, Guerra, Luk, Towne, Kow*, and *McGrew*).[2]

In addition, as discussed in our opening brief, the circuit courts are divided over the issues raised by defective warrants, supporting documentation, and the good faith of officers executing warrants in varying circumstances. *See* Pet. Br. 32-34. And where the federal courts of appeals are split on the underlying constitutional issue, qualified immunity is proper: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.[3]

Finally, respondents repeatedly cite one passage of dictum from the *Leon* case, concerning facially deficient warrants, which suggests that the "good faith" exception might not apply in those circumstances. *See Leon*, 468 U.S. at 923. Yet it is unclear how much weight such dictum should receive in the calculus necessary to assess a claim for qualified immunity, particularly in a context where the other hypotheticals discussed by the Court all concern actions taken in bad faith, such as lying to or misleading the magistrate. *See id.* Moreover, the dictum from *Leon* must be weighed against the actual holding in *Sheppard*, its companion case, which is virtually identical to this case in certain key respects, and in which the Court reached a result that favors petitioner here. *See* Pet. Br. 31, 38-39 (discussing *Sheppard*). Respondents try to distinguish *Sheppard* on the grounds that the officers there had received "specific . . .

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[2] Respondents also cite *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1997), which further extends the crazyquilt pattern of the law here; *Marks* appears to favor respondents but on facts more egregious than those at issue here, since in *Marks* the officers commenced a wide-ranging search of properties and persons *before* they had received proper authorization by means of an actual warrant. *See id.* at 1019-23.

[3] Another supporting indicator of this legal uncertainty is the Court's decision to grant *certiorari* and decide the issue in this case. *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to give it "the definitive answer that it demanded").

assurances" from the magistrate that the magistrate would correct certain deficiencies that were known to exist in the warrant, Resp. Br. 15-16, but that fact may well cut the other way. Indeed, it would appear that *more* responsibility to take corrective action should lie with officers who *know* their warrant may be defective than with an officer, like petitioner here, who was unaware of *any* defect until afterwards, and who otherwise received "specific assurances" from the magistrate in the straightforward sense that the magistrate approved his application and issued the warrant. Therefore, qualified immunity is appropriate here.

B. Petitioner Is Not Subject to Personal Liability for Making Reasonable Mistakes of Fact.

In addition to judging public officials against the backdrop of clearly established law, the Court's precedents also indicate that officials do not lose the protection of qualified immunity unless their conduct was objectively unreasonable under the precise circumstances. "What this means in practice is that 'whether an official . . . may be held personally liable . . . generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson*, 526 U.S., at 614 (quoting *Anderson*, 483 U.S. at 639).

For example, an officer can have a reasonable though mistaken belief that a warrant contains the necessary level of particularity, and the Court has found that such conduct does not violate the Constitution. *See, e.g.*, *Garrison*, 480 U.S. at 85-89. Even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable search, this Court's precedents still would grant the officers qualified immunity from personal liability for reasonable mistakes about such points as whether probable cause existed to justify their search. *See, e.g.*, *Anderson*, 483 U.S. at 643; *Malley*, 475 U.S. at 344-45. *See also* Pet. Br. 35-43.

Where an officer acts on the basis of a reasonable mistake of fact or, as in this case, makes an innocent proofreading error, the policies that animate the qualified immunity doctrine apply

with full force. *See, e.g.*, *Malley*, 475 U.S. at 344-45 (equating threshold for qualified immunity with showing necessary to invoke the "good faith" rule courts apply in criminal cases). This point is reinforced by the Court's square holding in *Sheppard*, and the same principles apply here as well. In the context of the "rapidly evolving" process of applying for a warrant, *see Saucier*, 533 U.S. at 205, occasional mistakes of this kind are understandable and not unreasonable. *See, e.g.*, *Garrison*, 480 U.S. at 86-89; *Sheppard*, 468 U.S. at 988-990.

The record here shows that petitioner acted in good faith, in accordance with a judicial order issued by the proper authorities, which he believed to be valid and authoritative. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). His overall course of conduct was responsible, "objectively reasonable and largely error-free." *Sheppard*, 468 U.S. at 990. Because it would be unreasonably and unproductively harsh to subject him to personal liability for money damages merely because of his inadvertent failure to notice an error in a judicial order, qualified immunity should be upheld.

CONCLUSION

For all of these reasons, the judgment below should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

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No. 02-811

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Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,
Respondents.

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BRIEF OF THE STATES OF TEXAS, ALASKA, DELAWARE, FLORIDA, HAWAII, INDIANA, MARYLAND, MINNESOTA, MISSISSIPPI, NEVADA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, VERMONT, VIRGINIA, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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In this case the Court must decide two questions: first, whether a search that is otherwise reasonable and supported by probable cause and a warrant issued by a magistrate judge is nonetheless *per se* unconstitutional because of a clerical error neglecting to specify the items to be seized on the face of the warrant; and second, whether a law-enforcement officer should be denied qualified immunity and found liable for relying on that warrant to execute the search. *Amici* States believe that both questions should be

answered in the negative, and therefore urge the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

INTEREST OF *AMICI*

The States of Texas, Alaska, Delaware, Florida, Hawaii, Indiana, Maryland, Minnesota, Mississippi, Nevada, Oklahoma, Pennsylvania, South Dakota, Vermont, Virginia, Washington, and Wisconsin appear as *amici curiae* in support of Petitioner. *See* SUP. CT. R. 37.4.

Amici States have a significant interest in this case due to its direct impact on state law-enforcement efforts. Indeed, *amici* States daily confront both Fourth Amendment and qualified immunity questions that could be directly impacted by the decision in this case. State law enforcement officers routinely conduct searches and seizures that are reasonable and, where necessary, supported by warrants and probable cause; inevitably, however, some of those searches and seizures will occur pursuant to warrants that have some form of technical defect.

If those searches and seizures were to be deemed *per se* unconstitutional by virtue of that fact alone, state law enforcement would face substantial uncertainty. If, in turn, law enforcement officers were to be held liable for carrying out searches and seizures pursuant to defective warrants signed by magistrate judges, state officers would face mounting litigation and potentially unchecked liability. Neither outcome would serve the interests of law enforcement, of *amici* States, or of the law-abiding citizens residing in every State.

SUMMARY OF THE ARGUMENT

In its decision below, the Ninth Circuit incorrectly analyzed the constitutionality of Special Agent Groh's search of the Ramirez home and, therefore, erroneously concluded that Agent Groh's

conduct was both unconstitutional and not protected by qualified immunity. Instead of determining whether Agent Groh's conduct was reasonable under the totality of the circumstances, the Ninth Circuit adopted a *per se* rule that an officer acts unconstitutionally when he or she executes a warrant that is defective for lack of particularity. *See Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1026 (CA9 2002), *cert. granted*, 123 S.Ct. 1354 (U.S. Mar. 03, 2003) (No. 02-811). The court's adoption of such a *per se* rule, however, cannot be squared with the common law or with this Court's Fourth Amendment jurisprudence.

Agent Groh's search of the Ramirez home was reasonable under the totality of the circumstances. It is uncontested that Agent Groh had probable cause for a warrant, that the warrant was based on information from a reliable informant, that the affidavit submitted described with particularity the items to be seized, that the search was in fact limited in scope to those items listed, and that the search occurred pursuant to a warrant duly signed by an independent magistrate judge. The Ramirezes' only complaint is that Agent Groh mistyped the items to be seized onto the warrant itself. This clerical error, admittedly a mistake, should not render Agent Groh's search unconstitutionally unreasonable.

The Ninth Circuit also erroneously concluded that Agent Groh's actions were not protected by qualified immunity. *See id.*, at 1028. Agent Groh's conduct was objectively reasonable under the circumstances; *a fortiori*, it did not violate clearly established law. Given that Agent Groh was acting pursuant to a warrant signed by a magistrate judge, and that officers should be entitled to rely on the legal determinations of judicial officers, his conduct should not, as a matter of law, have been deemed objectively unreasonable.

Accordingly, *amici* States urge this Court to make clear a simple bright line: that a law-enforcement officer cannot be found liable—and denied qualified immunity—where the officer acts

pursuant to a warrant issued by a magistrate judge. This Court should reverse the judgment of the court below, and hold that Agent Groh's conduct was both constitutional and objectively reasonable under the circumstances.

ARGUMENT

This case concerns whether a law-enforcement officer loses the protection of qualified immunity by conducting a search based on a warrant that is technically defective—even if the officer's conduct is otherwise reasonable. *Amici* States contend that an officer's search is not *per se* unconstitutional simply because a search is made pursuant to a warrant that contains a defect. Instead, an officer's search pursuant to a defective warrant is constitutional if objectively reasonable based on the totality of the circumstances, as Agent Groh's was here.

Generally, "government officials performing discretionary functions . . . are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Inquiries into qualified immunity must first examine whether an officer's conduct violated a constitutional right, and, if so, then examine whether that constitutional right was clearly established at the time of the officer's conduct. *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Layne*, 526 U.S., at 609.

The Court should hold that Agent Groh's conduct was not *per se* unconstitutional, and that Agent Groh is entitled to qualified immunity because his actions were objectively reasonable under the totality of the circumstances.

I. AGENT GROH'S SEARCH OF THE RAMIREZ HOME—BASED ON PROBABLE CAUSE SET FORTH IN A DETAILED AFFIDAVIT AND WARRANT APPLICATION THAT WAS APPROVED BY AN INDEPENDENT MAGISTRATE—WAS PROPERLY RESTRICTED IN SCOPE AND NOT UNCONSTITUTIONALLY UNREASONABLE.

A. The Ninth Circuit Erroneously Adopted a *Per Se* Rule Regarding Searches Based on Warrants That Contain a Defect.

The initial inquiry in this case is whether a law-enforcement officer's search of a home—based on a warrant that fails to accurately name the items intended to be seized—constitutes a *per se* violation of the Fourth Amendment, or whether, as *amici* States contend, the officer's conduct can be adjudged constitutionally reasonable under the totality of the circumstances.

The starting point of constitutional analysis is and should be the text, and the text of the Fourth Amendment provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

The Amendment has two clauses, the first mandating that searches and seizures not be "unreasonable," and the second that warrants issue only in certain circumstances. Notably, the Amendment lacks a third clause—one sometimes improperly assumed—linking the first and second and requiring that every search and seizure be preceded by probable cause and a warrant.

Amici States submit that the Amendment means what it says, that the test of constitutionality for searches and seizures is, plain and simple, reasonableness.

This Court has, in effect, said so on numerous occasions: "The touchstone of our analysis under the Fourth Amendment is *always* 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam) (emphasis added) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)); *see also Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (same); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'") (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

As the Court has explained, "the essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'" *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)); *see also Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *United States v. Knights*, 534 U.S. 112, 118-19 (2001); *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

To be sure, whether the two clauses of the Fourth Amendment are to be read independently—or as one—is a matter on which this Court has not always spoken with one voice. *See California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in judgment). ("[O]ur jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."). But the better part of this Court's Fourth Amendment case law focuses, as does the text of the Constitution,

on reasonableness *vel non* as the dispositive measure of the constitutionality of a search or seizure.

Nonetheless, in the decision below, the Ninth Circuit erroneously collapsed the Fourth Amendment's two clauses into one, effectively adopting a *per se* rule that a law-enforcement officer who conducts a search pursuant to a warrant that lacks particularity necessarily violates the Fourth Amendment—regardless of whether the officer's conduct is otherwise reasonable. *See Ramirez*, 298 F.3d, at 1026.

The Ninth Circuit engaged in a single inquiry: whether the warrant was defective. *Id.*, at 1025-27. It did not consider whether Agent Groh's conduct was constitutionally reasonable under the totality of the circumstances. *Id.* Instead, after concluding that the warrant failed to describe the items to be seized with sufficient particularity, the court stated its *per se* rule: "When officers fail to attach the affidavit to a general warrant, the search is rendered illegal because the warrant neither limits their discretion nor gives the homeowner the required information." *Id.*, at 1026 (citing *United States v. McGrew*, 122 F.3d 847, 850 (CA9 1997)).

In assessing reasonableness, this Court has eschewed *per se* rules in favor of measured analysis of the unique circumstances involved in each case. *See United States v. Drayton*, 536 U.S. 194, 201 (2002); *McArthur*, 531 U.S., at 331; *Robinette*, 519 U.S., at 39. The Ninth Circuit's decision below did not follow this Court's instruction. Instead, its judgment is based on one factor alone—that the warrant inaccurately described the items to be seized. *See Ramirez*, 298 F.3d, at 1026. Thus, the Ninth Circuit effectively created a *per se* rule that a police officer always acts unconstitutionally by executing a search—even if otherwise reasonable—that is supported by a warrant that inaccurately states the items to be seized. *See id.*

The Ninth Circuit's error is further confirmed by examining the common law at the time the Amendment was framed, a consideration that the Court has often looked to in assessing Fourth Amendment questions. *See Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Carroll v. United States*, 267 U.S. 132, 149 (1925). In the present case, the common law favors reading the Fourth Amendment's clauses independently—and therefore concluding that searches need only be "reasonable."

Indeed, the "supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law." *Acevedo*, 500 U.S., at 583-84 (Scalia, J., concurring in the judgment); *see also Layne*, 526 U.S., at 610 ("[T]he common-law tradition at the time of the drafting of the Fourth Amendment was ambivalent on the question whether police could enter a home without a warrant."). Instead, the Amendment's requirements for a valid warrant—that it be based on probable cause and made with sufficient particularity—are limitations upon the issuance of warrants, not requirements that mandate their use in every search and seizure. At common law:

> "[a] warrant was a means of insulating officials from personal liability assessed by colonial juries. An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was 'reasonable.' If, however, the officer acted pursuant to a proper warrant, he would be absolutely immune. By restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and

> seizures." *Acevedo*, 500 U.S., at 581-82 (Scalia, J., concurring in the judgment) (internal citations omitted).

Thus, the common law supports a reading that the Fourth Amendment's two clauses are intended to work independently—not to impose a general rule that all searches must be made pursuant to a warrant supported by probable cause and with sufficient particularity. *See generally* Akhil Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

In sum, the Ninth Circuit's *per se* rule cannot be squared with this Court's jurisprudence that reasonableness based on the totality of the circumstances determines the constitutionality of an officer's conduct. Moreoever, the Ninth Circuit's holding contradicts the common law by erroneously collapsing the two clauses of the Fourth Amendment into one. Accordingly, this Court should reject the reasoning of the Ninth Circuit, and, consistent with well-settled jurisprudence, look to all of the circumstances involved to analyze the constitutionality of Agent Groh's search of the Ramirez home.

B. Agent Groh's Conduct Was Not Unreasonable Under the Totality of the Circumstances.

The facts of this case, *see Ramirez*, 298 F.3d, at 1025, establish that Agent Groh's conduct was constitutionally reasonable under the totality of the circumstances: Agent Groh received two reports that the Ramirezes were in possession of an automatic rifle, a rocket launcher, a grenade launcher, and grenades. Agent Groh prepared an application for a search warrant along with a supporting affidavit. The application "properly described both the place to be searched and the objects sought." *Id.* Agent Groh then submitted the application and affidavit to a magistrate judge, who issued the warrant challenged in this proceeding. Unfortunately, the warrant itself did not contain an accurate list of the objects to be seized.

Instead, Agent Groh had mistakenly typed a description of the Ramirez home into the space provided for the list of items sought. *Id.*

After the warrant was approved by the magistrate, Agent Groh led agents from the Federal Bureau of Alcohol, Tobacco and Firearms, along with members of the county sheriff's department, to execute the warrant. Mrs. Ramirez was present when the officers entered the home. Agent Groh explained to Mrs. Ramirez that they were searching, pursuant to a warrant, for explosive devices. Apparently, Mrs. Ramirez attempted to phone her attorney during the search but was unable to reach him. As the officers left, Agent Groh gave Mrs. Ramirez a copy of the warrant, though the application and affidavit were not attached. No items were seized, and no charges were filed against the Ramirezes. *Id.*

The next day, Mrs. Ramirez faxed a copy of the warrant to her attorney. The attorney subsequently phoned Agent Groh, who faxed the attorney the page of the warrant application that accurately listed the items to be seized. *Id.*

While Agent Groh unquestionably made a clerical mistake when he mistyped the items to be seized on the search warrant, *id.*, the totality of the circumstances plainly demonstrates that Agent Groh's conduct was objectively reasonable. Indeed; virtually every aspect of the search is unchallenged. The Ramirezes do not contest that Agent Groh had probable cause to search their home for the explosive devices listed in the warrant application. *Cf. McArthur*, 531 U.S., at 331. Nor do they contest that Agent Groh's warrant application was based on information provided by a reliable informant, *id.*, at 332, or that it was of proper detail. The Ramirezes do not at all challenge the validity of the warrant application or Agent Groh's affidavit.

The Ramirezes also do not contest that the officer's search of their home was, in fact, limited to the items listed in the warrant

application—items for which Agent Groh had probable cause to search based on reliable information. And, the Ramirezes do not contest that Agent Groh received approval for the search warrant from a fully informed independent magistrate. *Cf. Massachusettes v. Sheppard*, 468 U.S. 981, 987-91 (1984). Indeed, from the beginning of the search process to the end, the officer's search was properly limited in scope, supported by probable cause, backed by reliable information, and constrained within the boundaries intended by both Agent Groh and the independent magistrate. *Cf. United States v. Bonner*, 808 F.2d 864, 868 (CA1 1986); *United States v. Turner*, 770 F.2d 1508, 1511 (CA9 1985).

Moreover, the Ramirezes do not contend that Agent Groh's clerical mistake was intentional or that he knew of the mistake but continued with the search nonetheless. *Cf. United States v. McCain*, 677 F.2d 657, 661 (CA8 1982). The Ramirezes' one and only complaint about Agent Groh's conduct is that he mistyped the items to be seized on the actual warrant.

The totality of the circumstances plainly demonstrates the reasonableness of the search: there was probable cause; it was supported by reliable information; a warrant issued; it was signed by an independent magistrate judge; he relied on an accurate affidavit; that affidavit specified the place to be searched and items to be seized; the Ramirezes were expressly made aware of the specific items to be seized; and the search was in fact so limited. While Agent Groh's inadvertent clerical mistake may have rendered the warrant technically defective,[1] the totality of the circumstances weighs overwhelmingly in favor of the conclusion that his overall

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1. Although a warrant that fails to meet the "particularity" requirement is constitutionally infirm, *see Sanford v. Texas*, 379 U.S. 476, 511-12 (1965), whether an officer's search pursuant to such a warrant is in turn unconstitutional is a different and separate inquiry. *Cf. Maryland v. Garrison*, 480 U.S. 79, 84-89 (1987).

conduct was reasonable in this case. No one factor should trump all others.

Accordingly, the Court should reject the Ninth Circuit's holding that an officer's search of a private home is *per se* unconstitutional where the warrant fails to describe accurately the items to be seized, and hold that Agent Groh's conduct was reasonable under the totality of the circumstances.

II. QUALIFIED IMMUNITY SHOULD BAR THIS SUIT BECAUSE AGENT GROH'S CONDUCT, IN RELIANCE ON THE MAGISTRATE JUDGE'S INFORMED APPROVAL OF THE WARRANT APPLICATION, WAS OBJECTIVELY REASONABLE.

A. Under Current Law, Agent Groh's Search Was Objectively Reasonable.

Because Agent Groh's conduct was not unconstitutional, *see supra* at 9-12, qualified immunity automatically bars this civil action against him. Since there is no constitutional violation, there can be no civil liability against Agent Groh. *See Conn v. Gabbert*, 526 U.S. 286, 293 (1999). The Court, therefore, need proceed no further.

However, assuming *arguendo* that the Ninth Circuit was correct—that Agent Groh's search of the Ramirez home was in violation of the Fourth Amendment—Agent Groh should nonetheless be entitled to qualified immunity.

The second inquiry in a qualified immunity case, after finding a constitutional violation, is whether the constitutional right violated by the officer "was clearly established at the time of the search." *Layne*, 526 U.S., at 614. In practice, this inquiry "turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

The qualified immunity analysis recognizes that officers can and will make reasonable mistakes as to the legality of police conduct. Indeed, "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Katz*, 533 U.S., at 205. Accordingly, "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). Officers "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

The Ninth Circuit erroneously held that Agent Groh is not entitled to the protections of qualified immunity because, according to the court, "no reasonable grounds exist" for Agent Groh's execution of the warrant. *Ramirez*, 298 F.3d, at 1028. The Ninth Circuit did not look to the totality of the circumstances, but instead concluded that the warrant was so "facially deficient" that Agent Groh could not reasonably have presumed it to be valid. *Id.* (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). Because the Ninth Circuit did not consider all of the factual circumstances involved in Agent Groh's search, the court's conclusion was improper.

Agent Groh's search was objectively reasonable—for purposes of qualified immunity—for the same reasons that his conduct was constitutionally reasonable. *See supra* at 9-12. In short, although Agent Groh made a clerical mistake when he mistyped the items to be seized on the warrant, it is not contested that Agent Groh had probable cause for the warrant, that the warrant was based on information from two reliable informants, that the warrant application and affidavit were proper, that the search was limited in scope to the items listed in the warrant application and affidavit, and that the search proceeded within the limited scope intended by

both Agent Groh and the independent magistrate. *Id.* Under the circumstances, Agent Groh's conduct was not "plainly incompetent." *See Hunter*, 502 U.S., at 229.[2]

In any event, Agent Groh's conduct did not violate any law that was clearly established at the time of the search. Indeed, *amici* are unable to locate any cases decided prior to Agent Groh's search of the Ramirez home adopting a rule that an officer's search pursuant to a technically defective search warrant is *per se* unconstitutional. As a result, Agent Groh cannot be held to have violated clearly established law.

The Ninth Circuit relied predominantly on its decision in *McGrew* to hold that Agent Groh's search of the Ramirez home was unconstitutional. *See Ramirez*, 298 F.3d, at 1026 (discussing *McGrew*, 122 F.3d, at 850). *McGrew*, however, was not decided until *six months after* Agent Groh's search of the Ramirez home. *See* Pet. at 3-4; *McGrew*, 122 F.3d, at 847. Therefore, the Ninth

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2. The Ninth Circuit also faulted Agent Groh because "he did not read the warrant *after* the magistrate issued it," 298 F.3d, at 1028 (emphasis added), and so did not notice the error. But, the Ninth Circuit ignored the fact that it was Agent Groh himself who had "mistakenly typed," *id.*, at 1025, the information on the warrant; therefore he would have felt no need to re-read the warrant he himself had prepared—merely to ensure that the magistrate judge had signed it. As this Court has noted, "[n]ormally, when an officer who has not been involved in the application stage receives a warrant, he will read it in order to determine the object of his search." *Sheppard*, 468 U.S., at 989 n.6. *Sheppard* went on to contrast that situation with the situation faced there—as here—when the "officer who directed the search . . . knew what items were listed in the affidavit presented to the judge, and . . . had good reason to believe that the warrant authorized the seizure of those items," *id.*, a situation squarely covered by qualified immunity regardless of whether the officer re-read the warrant after it was signed.

Circuit's *McGrew* cannot be considered clearly established law at the time of Agent Groh's search.

Moreover, the district court's decision in *McGrew*—a decision that was made prior to Agent Groh's search—*upheld* the validity of a search challenged on grounds that the warrant executed failed for lack of particularity. *See McGrew*, 122 F.3d, at 849. If the unlawfulness of a search pursuant to a defective warrant was not evident to the district court judge, it is difficult to comprehend how such unlawfulness could have been so clearly established to have been plainly evident to a law-enforcement officer.

The decision below also relied on this Court's statement, made in *Leon*, 468 U.S., at 923, that "depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." 468 U.S., at 923; *see also Ramirez*, 298 F.3d, at 1028. This statement, however, does not clearly delineate unlawful conduct. Instead, it merely acknowledges that there may be, under some hypothetical circumstances, a future case involving a warrant that is "so facially deficient" that it cannot be presumed to be valid. *Id.* And, even if this statement could be interpreted to create a "clearly established" rule of law, it is not clear, at a minimum, that such a rule would apply where, as here, the agent merely made a clerical error typing the warrant application—as opposed to wholly omitting the necessary specification from the accompanying affidavit. In no way does the Court's statement in *Leon* "clearly establish" a rule of law violated by Agent Groh.

Moreover, numerous decisions of other circuits, outside the Ninth Circuit, further demonstrate why it could not have been objectively unreasonable for Agent Groh to rely on the signed warrant in these circumstances. In *United States v. Burke*, 784 F.2d 1090, 1092-93 (CA11 1986), for example, the Eleventh Circuit held

that a warrant, though defective because it listed an incorrect address, described the place to be searched with sufficient particularity to satisfy the Fourth Amendment because the home actually searched was the home intended to be searched. *See also Bonner*, 808 F.2d, at 868; *Turner*, 770 F.2d, at 1511. In another case, the Eleventh Circuit held that ambiguity in the items to be seized on a warrant can be cured by clarity in the warrant application—even if the warrant is not attached or incorporated. *See United States v. Wuagneux*, 683 F.2d 1343, 1350-51 and 1350 n.6 (CA11 1982). This Court too has held that an officer's reliance on a warrant signed by an independent magistrate can be reasonable even where the warrant is ultimately found to suffer from a defect. *See Sheppard*, 468 U.S., at 987-91.

Because it cannot be said that a clearly established rule—in place at the time of the search—prohibited Agent Groh's search of the Ramirez home, Agent Groh is entitled to the protections of qualified immunity.

B. A Law-Enforcement Officer's Search Should Be Protected by Qualified Immunity Whenever the Search Is Executed Pursuant to a Warrant Signed by an Independent Magistrate Judge.

Agent Groh's conduct was objectively reasonable based on all of the circumstances involved in his search of the Ramirez home. *See supra* at 9-12, 13-14. However, *Amici* States submit that a far simpler rule should resolve the qualified-immunity question in this case.

Every day, state and federal law-enforcement officers seek warrants from state and federal magistrates. Those magistrate judges, professionals learned in the law, decide whether and when to issue those warrants. Two decades ago, this Court held that the exclusionary rule does not apply to evidence seized in good-faith reliance on a warrant signed by a magistrate judge. *Leon*, 468 U.S.,

at 922. That same rule has been applied to qualified immunity. *See Malley*, 475 U.S., at 344. Thus, under current case law, if a court deems an officer's reliance upon a magistrate judge's warrant to be "objectively unreasonable," qualified immunity will be denied. *Id.*

But there are substantial reasons for the rules governing qualified immunity to be even more forgiving than the current exclusionary-rule standards. Under current jurisprudence, it is not uncommon for a trial court to find a particular piece of evidence inadmissible because of problems in its seizure;[3] surely every officer involved in every one of those cases should not be found lacking in qualified immunity and so liable for damages.[4]

Accordingly, *amici* States would urge the Court to adopt an even clearer bright line: that whenever a law-enforcement officer executes a search or seizure pursuant to a warrant signed by a magistrate judge, he or she cannot be found liable in damages.

Although the Court has "generally eschewed bright-line rules in the Fourth Amendment context," *Wilson*, 519 U.S., at 885 n.1, it

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3. Of course, *amici* States would also urge limiting the overbroad application of the exclusionary rule so as to prevent freeing the guilty on what many perceive as technicalities, but that is a question to be addressed in another case.

4. Moreover, rules requiring "objective reasonableness" can, in the hands of some lower courts, expand far beyond the egregious examples envisioned by this Court. Thus, in *Malley* the Court could comfortingly caution, "it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable." 475 U.S., at 345 n.8. But, that is exactly what happened in the instant case, where the magistrate issued a warrant with a "mistakenly typed . . . description," *Ramirez*, 298 F.3d, at 1025, and the officer was found liable for not catching that typographical error.

has also found Fourth Amendment instances where such delineations are appropriate, *id.*; *see also Mimms*, 434 U.S., at 111 n.6. This is just such an instance.

Indeed, qualified immunity is an area where bright-line rules are especially appropriate, given that the primary purpose of denying such immunity is to deter officer misconduct. And deterrence is rendered most effective when there are clear, simple rules that all officers can understand and anticipate.

"As Lord Mansfield stated [over] two centuries ago: 'It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Malley*, 475 U.S., at 352 (Powell, J., concurring in part and dissenting in part) (quoting *Leach v. Three of the King's Messengers*, 19 How.St.Tr. 1001, 1027 (1765)).

"In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S., at 898.[5] If it is not reasonable for the officer to second-guess the magistrate judge's legal judgment on the warrant, it is not reasonable to "[p]enaliz[e] the officer for the magistrate's error, rather than his own," *id.*, by holding him liable for damages.

Clear, bright-line rules will allow *ex ante* predictability and certainty. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-79 (1989). And, because qualified immunity depends—at its core—on the legal understanding of law-enforcement officers, bright-line rules are particularly advantageous

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5. As this Court has made clear, officers are not required "to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Sheppard*, 468 U.S., at 990.

in the context of qualified immunity.

Furthermore, having a bright-line rule that an officer is entitled to qualified immunity when relying on a warrant signed by an independent magistrate judge is consistent with the history and rationales of the doctrine. Indeed, the Court's immunity jurisprudence has systematically evolved towards greater protections for officials who act within the current boundaries of the law, at any given time, *as articulated by judges. See generally Butz v. Economou*, 438 U.S. 478, 485-517 (1978). Articulating the bright line would complete the journey, and make clear that law-enforcement officers are entitled to rely upon—or, at least will not be found civilly liable for relying upon—the legal judgments of members of the judiciary.

Therefore, *amici* States urge the Court to clarify that qualified immunity protects state and federal law-enforcement officers who rely upon warrants signed by independent magistrate judges.

CONCLUSION

For these reasons, the Ninth Circuit's judgment should be reversed.

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In the Supreme Court of the United States

JEFF GROH, PETITIONER

v.

JOSEPH R. RAMIREZ, *ET AL.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a federal officer who applied for and executed a search warrant in the good-faith but mistaken belief that the warrant specified the items to be seized, is subject to suit under the Fourth Amendment and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when the search was conducted in accordance with the description of the items to be seized that was included in the officer's warrant application and supporting affidavit.

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In the Supreme Court of the United States

No. 02-811

JEFF GROH, PETITIONER

v.

JOSEPH R. RAMIREZ, *ET AL.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the application of the Warrant Clause of the Fourth Amendment, the cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the law of qualified immunity to a search conducted by a federal officer pursuant to a search warrant approved by a magistrate judge. The United States has a substantial interest in this case because its law enforcement activities are subject to the requirements of the Warrant Clause. The United States also has an interest in the extent to which federal officers are subjected to trial and exposed to liability under *Bivens* for allegedly unconstitutional conduct, and in the application of immunity principles that protect government employees, including law

enforcement officers, from meritless and unduly burdensome litigation that may interfere with the exercise of lawful discretion in their official functions and deter qualified individuals from public service.

STATEMENT

1. Petitioner has been a Special Agent of the Bureau of Alcohol, Tobacco and Firearms (ATF) since 1989.[1] See Pet. App. 30a. In 1996, a contractor who was working at respondents' ranch in Montana reported to authorities that he had heard and seen automatic weapons on the ranch, and seen a hand grenade and handguns in respondents' residence. Other individuals also reported that automatic weapons had been fired on respondents' ranch. Petitioner visited the ranch with respondents' permission and confirmed the presence of firearms. *Id.* at 30a-32a.

In February 1997, petitioner spoke with another witness—a former United States Marine—who reported that he had seen approximately two dozen 40-millimeter grenades and a military grenade launcher, used for surface-to-air attacks, inside respondents' residence. Pet. App. 33a-34a. Another informant advised that respondents possessed a "rocket launcher." *Id.* at 35a. Petitioner's check of ATF records indicated that respondents lacked authorization to possess automatic weapons or grenades. *Ibid.*

Petitioner prepared an application for a warrant to search respondents' residence. Pet. App. 28a-29a. The sworn warrant application described the location and appearance of the residence and stated that the items to be seized were:

[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, generally transferred the "authorities, functions, personnel, and assets" of ATF from the Department of the Treasury to the Department of Justice. The former ATF is now the Bureau of Alcohol, Tobacco, Firearms, and Explosives within the Department of Justice. See § 1111(a) and (c), 116 Stat. 2274-2275.

> any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.

Id. at 28a. Petitioner's accompanying affidavit recited the facts establishing probable cause and provided a similar description of the items to be seized. *Id.* at 30a-35a.

Petitioner also prepared a warrant for the magistrate judge's signature. The warrant described the location of respondents' residence. However, in the space reserved for a description of the property to be seized, petitioner mistakenly typed a description of the appearance of respondents' residence. Pet. App. 4a; see *id.* at 26a-27a. The property to be seized was not described on the warrant form and the warrant form did not expressly incorporate the application or supporting affidavit. *Id.* at 26a-27a.

On March 3, 1997, petitioner presented the warrant application and warrant form to a federal magistrate judge. See Pet. App. 15a. The magistrate judge signed the warrant application and the warrant form. *Id.* at 27a, 29a.

2. On March 4, 1997, petitioner executed the warrant as the leader of a team consisting of ATF agents and members of the local sheriff's department. Pet. 4; Pet. App. 4a. Petitioner advised the other officers of the object of the search, as stated in the warrant application and affidavit. Pet. App. 15a. When executing the warrant, petitioner spoke with respondents Julia Ramirez (who was at the residence) and Joseph Ramirez (by telephone) and described the object of the search. *Id.* at 4a, 15a. The officers photographed respondents' home and recorded the serial numbers of guns they found, but they discovered no illegal weapons or explosives. *Id.* at 4a. Upon departing, petitioner gave Julia Ramirez a copy of the warrant, without the application or affidavit.

Ibid. The next day, at the request of respondents' counsel, petitioner provided respondents' counsel the application's description of the items to be seized. *Ibid.*

3. Respondents sued members of the search party for money damages in the United States District Court for Montana, alleging constitutional violations. Pet. App. 4a, 14a. Before trial, the district court dismissed the First, Fifth, and Ninth Amendment claims that respondents had brought against petitioner and other federal agents under *Bivens*, concluding that they failed to state claims on which relief could be granted. *Id.* at 16a-17a. The court granted summary judgment for the federal defendants on respondents' Fourth Amendment *Bivens* claim. *Id.* at 18a-24a. The court concluded that there was no constitutional violation, *id.* at 20a-22a, and, in the alternative, that the federal defendants "are entitled to qualified immunity * * * because [petitioner] acted in an objectively reasonable manner," *id.* at 23a.

4. The court of appeals affirmed the dismissal of all claims against petitioner, except the Fourth Amendment claim based on the warrant's failure to describe the items to be seized. Pet. App. 1a-12a. In relevant part, the court stated that the warrant was "facially defective" under the Fourth Amendment and *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997), "because it provided no description of the evidence sought" and "didn't refer to or incorporate the application or affidavit." Pet. App. 6a; see *id.* at 5a. The court further reasoned that petitioner lacked any ability to overcome the warrant's "facial" deficiency at the scene of the search, because he "was empowered only to execute the warrant" and any changes to the warrant had to be made by the magistrate judge. *Id.* at 6a.

The court of appeals next addressed whether petitioner is immune from suit on respondents' Fourth Amendment claim under the law of qualified immunity. Pet. App. 7a-10a. The

court stated that "[t]he officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions." *Id.* at 8a. Therefore, the court said, the lead officer(s) must "read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way." *Ibid.*

The court of appeals deemed petitioner to be the sole leader of the search in this case. Pet. App. 9a. It accepted that the existence of an error in the warrant did "not automatically deprive [petitioner] of immunity." *Ibid.* Instead, the court said, "[t]he question is whether the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it." *Ibid.* The court determined that petitioner is not entitled to qualified immunity under that standard because "he did not read the warrant"—which he had prepared and the magistrate had approved—"after the magistrate issued it and before he began the search. Had he done so, he would surely have realized that it did not contain a list of items to be seized and was therefore facially defective." *Id.* at 10a.

SUMMARY OF ARGUMENT

This case arises from a good-faith clerical mistake in the drafting of a search warrant. The mistake did not constrain or compromise the magistrate judge's probable-cause determination, and it had no effect on the execution of the warrant at respondents' residence. The record indicates that respondents were unaware of the clerical mistake during the execution of the warrant, and petitioner promptly cured the mistake, by providing information from the warrant application, when respondents' counsel called the error to petitioner's attention. Under the circumstances, petitioner should not be subject to the burden of a trial and the possibility of personal liability under *Bivens* v. *Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

A. The Warrant Clause of the Fourth Amendment serves to circumscribe the discretion of law enforcement officers when they conduct a search. It ensures that a neutral magistrate will determine the existence of probable cause, and that the search will be tailored to the magistrate's probable-cause determination.

The Clause has been applied in a pragmatic fashion consistent with those purposes. For example, reasonable detail, not absolute exactitude, is required in the warrant's description of the place to be searched and the items to be seized. Similarly, errors or omissions in the warrant do not necessarily render a search unlawful, particularly when the officer executing the warrant has personal knowledge of the intended object of the search. The facts of this case—involving a clerical mistake that did not affect the magistrate's probable-cause determination, the execution of the warrant, or respondents' subjective perception of the search—illustrate the appropriateness of that pragmatic approach. Finding a violation of the Warrant Clause on these facts would do nothing to advance the underlying goals of the Fourth Amendment.

B. Even if petitioner's good-faith mistake rendered the warrant constitutionally defective, that defect should not give rise to a damages action under *Bivens*. The compensatory purpose of the *Bivens* remedy would not be served in this case, nor in the general run of cases alleging technical defects in descriptions of items to be seized, because—due to the nature of the alleged constitutional violation—there is no compensable injury. The alleged violation, *i.e.*, the deficiency of the warrant on its face, had no substantive effect on the search of respondents' ranch. Nor does the deterrence rationale justify the inference of a *Bivens* action. The deterrent effect of the *Bivens* remedy is not enough by itself

to support the inference of that remedy and, because petitioner acted in good faith, this is not a situation in which *Bivens* liability would serve to deter conscious wrongdoing.

C. Even if the Court were to find a constitutional violation that is actionable under *Bivens*, petitioner would be entitled to qualified immunity. The Ninth Circuit denied petitioner qualified immunity based on a new rule that the leader of a search must re-check the warrant after the magistrate approves it, even when the leader personally prepared the warrant. That new rule cannot properly be applied retroactively to condemn petitioner's conduct in this case.

The Fourth Amendment law that governed petitioner's execution of the warrant was not clearly established at the time of the search. Qualified immunity also should protect petitioner from suit because his conduct was objectively reasonable. The standard for qualified immunity is akin to the good-faith exception to the exclusionary rule, as established in *United States* v. *Leon*, 468 U.S. 897 (1984). Applying *Leon*, this Court and the courts of appeals have correctly deemed officers' conduct objectively reasonable, and therefore declined to suppress evidence under the exclusionary rule, on facts similar to the facts of this case. Similarly, no officer should be personally liable for executing the magistrate-approved warrant in this case. Petitioner is entitled to protection from suit because his conduct in obtaining and executing the warrant was reasonable under the totality of the circumstances.

ARGUMENT

PETITIONER SHOULD NOT BE SUBJECTED TO TRIAL OR LIABILITY FOR HIS EXECUTION OF THE SEARCH WARRANT IN THIS CASE

Petitioner acted in good faith when he applied for and executed the search warrant in this case. That is not disputed. See Pet. App. 6a n.2, 24a. Petitioner prepared a

warrant application and supporting affidavit that correctly specified the items to be seized in the search. *Id.* at 15a, 21a. The magistrate judge signed the warrant application and approved the warrant. See *id.* at 23a, 26a-29a. Petitioner correctly instructed the search team about the items to be seized. *Id.* at 9a, 21a. The search was conducted in accordance with the restrictions set out in the warrant *and* the warrant application and supporting affidavit. See *id.* at 4a, 23a. Respondents were told at the time of the search about the objects of the search, *id.* at 4a, 6a, 15a, 18a-19a, and petitioner promptly provided their counsel with the warrant application's written description of the items to be seized, *id.* at 16a, 21a.[2] Petitioner gave respondents a copy of the warrant at the conclusion of the search. *Id.* at 4a, 15a. Despite petitioner's mistake when filling in the warrant form, respondents received all of the substantive protections guaranteed by the Warrant Clause. Under all the circumstances, petitioner's good-faith conduct in obtaining judicial authorization for the search and executing the search should not subject him to the burden of a trial or the prospect of personal liability.

Most courts of appeals have concluded that clerical errors in the preparation of a search warrant, which do not have a substantial effect on the search, do not necessarily violate the Fourth Amendment. See pp. 13-15, *infra*. In addition, courts frequently have addressed the issue in the context of motions to suppress evidence in criminal trials, and have held that, under *United States* v. *Leon*, 468 U.S. 897 (1984),

[2] In the court of appeals, respondents disputed that petitioner told them during the search every item listed in the warrant application. But even under respondents' version of the facts, petitioner advised them that he was searching for boxed explosives. Pet. App. 6a. The court of appeals deemed that factual dispute, which apparently was not preserved in the district court, "immaterial" and did not resolve it. *Ibid.*; see *id.* at 15a, 21a.

evidence acquired in good faith, but pursuant to a facially defective warrant, should not be excluded. See p. 28 & note 13, *infra*. In those cases the availability of the *Leon* good-faith exception has obviated the need for rigorous analysis of whether such good-faith mistakes violate the Fourth Amendment, and there has been no occasion to consider the officers' civil liability.

Because this case arises in the context of a damages action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the dispute cannot be resolved by the application of *Leon*. The constitutional issue must be addressed directly, if only as the threshold question in qualified-immunity analysis. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Under the step-by-step analysis that is appropriate in this situation, the judgment of the court of appeals should be reversed because: (1) there was no violation of the Fourth Amendment in this case; (2) a *Bivens* remedy should not be inferred in this context; and (3) petitioner is immune from suit under the law of qualified immunity.

A. Despite Petitioner's Clerical Mistake In Preparing The Warrant, The Purposes Of The Warrant Clause Were Satisfied And There Was No Constitutional Violation

1. "The basic purpose of [the Fourth] Amendment * * * is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara* v. *Municipal Ct.*, 387 U.S. 523, 528 (1967). The Amendment therefore provides that searches must be reasonable, which necessarily turns on "the facts of the case." *Terry* v. *Ohio*, 392 U.S. 1, 15 (1968); see *id.* at 9, 20-22; see also, *e.g.*, *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

When it applies, the Warrant Clause gives specific content to the Fourth Amendment's general reasonableness requirement. The Clause provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The central function of the Clause is to "circumscribe[] "the discretion of the official in the field" when a search is conducted. *Camara*, 387 U.S. at 532.

That function is accomplished by two features of the Warrant Clause. First, when a warrant is required, the Clause ensures that the existence of probable cause will be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), thus "minimiz[ing] the risk of unreasonable assertions of executive authority." *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979); see *Illinois* v. *Gates*, 462 U.S. 213, 240 (1983) (magistrate's determination of probable cause is "[t]he essential protection of the warrant requirement"). The role of the magistrate is critical, and the Clause directs magistrates that "no Warrants shall issue" unless the Clause's requirements are satisfied. U.S. Const. Amend. IV. "[T]he very heart of" the requirement of a magistrate's approval is that, "where practicable, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *United States* v. *United States Dist. Ct.*, 407 U.S. 297, 316 (1972).

Second, the particularity requirements of the Clause "prevent general searches." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). They "ensur[e] that the search will be carefully tailored to its justifications, and will not take on the

character of the wide-ranging exploratory searches the Framers intended to prohibit." *Ibid.* In particular, the description of the "things to be seized," U.S. Const. Amend. IV, safeguards against "a general, exploratory rummaging in a person's belongings" and prevents the executing officer from substituting his own discretion about what to take under the warrant for the magistrate's determination. *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976) (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971)); see *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977) ("Once a lawful search has begun, it is * * * far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.'"), overruled on other grounds, *California* v. *Acevedo*, 500 U.S. 565 (1991).

The Court has suggested that the Warrant Clause also serves to provide assurance to the individual whose property is being searched or seized. See *Chadwick*, 433 U.S. at 9 ("[A] warrant assures the individual * * * of the lawful authority of the executing officer, his need to search, and the limits of his power to search."). To the extent that function is served, but see pp. 17-18, *infra*, it can be viewed as an aspect of the general policy that the individual should not be entirely subject to the executing officer's discretion during the search. See *Camara*, 387 U.S. at 532.

2. The Court has stated that the Warrant Clause "categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.'" *Garrison*, 480 U.S. at 84. But although the particularity language of the Clause may be "categorical" in its application to every warrant, this Court, as well as the courts of appeals, have resisted interpretations of this language that—contrary to the bedrock reasonableness principle of the Fourth Amendment

—would demand perfect formal compliance without regard to the surrounding facts. "The particularity requirement traditionally has been applied in a pragmatic manner designed both to protect the subject of the search from the abuses of a generalized search and, at the same time, to recognize realistically the needs of law enforcement." *United States* v. *Jones*, 54 F.3d 1285, 1291 (7th Cir.), cert. denied, 516 U.S. 902 (1995).

For example, the Warrant Clause does not require an *exact* description of the place to be searched or the property to be seized. Rather, the warrant should be "reasonably detailed." *Garrison*, 480 U.S. at 89 n.14; see *Steele* v. *United States No. 1*, 267 U.S. 498, 503 (1925) ("It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.").

Likewise, errors or omissions in the warrant do not necessarily render the ensuing search unlawful, particularly when the officer executing the warrant has personal knowledge of the intended object of the search. *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), illustrates the point. In *Sheppard*, a detective sought a warrant to search Sheppard's residence for evidence of a murder. The affidavit supporting the warrant application listed the items to be seized, but the only available warrant form was one used for drug searches. *Id.* at 985. The judge told the detective "that he would make the necessary changes so as to provide a proper search warrant." *Id.* at 986. However, the judge failed to make the appropriate changes. *Ibid.* The detective and two other police officers executed the warrant, limiting their search to the items listed in the supporting affidavit, and found incriminating evidence. *Id.* at 986-987.

The Massachusetts Supreme Court determined that the search violated the Constitution due to the facially defective warrant and that the evidence seized during the search

should have been suppressed at trial. 468 U.S. at 988; see *id.* at 987. The Commonwealth of Massachusetts sought review in this Court, on the issue whether—assuming a constitutional violation—the state court's application of the exclusionary rule was correct. Pet. at i, *Massachusetts* v. *Sheppard*, No. 82-963 (filed Dec. 8, 1982). The State accepted for purposes of this Court's review that the warrant was constitutionally defective despite the specification of the items to be seized in the warrant application. 468 U.S. at 988 & n.5.[3] However, this Court noted that the warrant clearly would have been valid "if the judge had crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant." *Id.* at 990 n.7.

Sheppard demonstrates that the Warrant Clause does not require the warrant form *itself* to describe the items to be seized in the search. Some courts of appeals apply that principle only to the precise extent compelled by *Sheppard*, holding that a defective warrant can be cured by a supporting affidavit that is attached to the warrant *and* specifically referenced in the warrant. See Pet. App. 5a; *United States* v. *Dahlman*, 13 F.3d 1391 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994). In other cases, circuit courts have deemed acceptable either a reference to an unattached affidavit *or* physical attachment of the affidavit. See, *e.g.*, *United States* v. *Thomas*, 263 F.3d 805, 808 (8th Cir. 2001) (incorporation by reference alone sufficient), cert. denied, 534 U.S. 1146 (2002); *United States* v. *Stefonek*, 179

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[3] After the petition was granted, the State argued in its brief that the search was not "unreasonable" under the general Fourth Amendment prohibition on "unreasonable searches and seizures," U.S. Const. Amend. IV, even though the warrant was assumed to be "constitutionally defective" under the Warrant Clause. *Sheppard*, 486 U.S. at 988 n.5. The Court did not accept that argument. *Ibid.*

F.3d 1030, 1033 (7th Cir. 1999) (either incorporation or attachment sufficient), cert. denied, 528 U.S. 1162 (2000); *United States* v. *Dale*, 991 F.2d 819, 847-848 (D.C. Cir.) (incorporation by reference alone sufficient), cert. denied, 510 U.S. 906 (1993). Still other decisions have held that a supporting affidavit can cure a warrant's over-broad description of the items to be seized, even if the warrant does not specifically incorporate the affidavit by reference, and the affidavit is not attached to the warrant. See, *e.g.*, *Jones*, 54 F.3d at 1289-1292 (affidavit provides serial numbers of currency being sought under warrant); *United States* v. *Bianco*, 998 F.2d 1112, 1116-1117 (2d Cir. 1993) (affidavit provides details about items listed in warrant), cert. denied, 511 U.S. 1069 (1994); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.) (same), cert. denied, 492 U.S. 918 (1989); *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982) (affidavit eliminates ambiguity in term "kickback funds"), cert. denied, 464 U.S. 814 (1983).[4]

In the same vein, this Court has rejected the proposition that it is illegal to execute "any warrant in which, due to a mistake in fact, the premises intended to be searched vary from their description in the warrant." *Garrison*, 480 U.S. at 89 n.14. Consistent with that statement, the courts of appeals—including the Ninth Circuit—have found that no Fourth Amendment violation occurred when officers executing a warrant were not misled by the warrant's incorrect description of the place to be searched. See, *e.g.*, *United States* v. *Vega-Figueroa*, 234 F.3d 744, 756 (1st Cir. 2000) (warrant describes wrong apartment building); *United States* v. *Hutchings*, 127 F.3d 1255, 1257, 1259-1260 (10th Cir. 1997) (wrong location of mobile home); *United States* v. *Garza*, 980 F.2d 546, 551-552 (9th Cir. 1992) (wrong house number); *United States* v. *Burke*, 784 F.2d 1090, 1092-1093 (11th Cir.) (wrong street name and building number), cert. denied, 476 U.S. 1174 (1986); *United States* v. *Clement*, 747 F.2d 460, 461 (8th Cir. 1984) (wrong apartment number). Cf. *United States* v. *Rytman*, 475 F.2d 192 (5th Cir. 1973) (seizure of mechanical part upheld despite incorrect serial number in warrant). In *United States* v. *Bonner*, 808 F.2d 864 (1986), cert. denied, 481 U.S. 1006 (1987), the First Circuit determined that a warrant's failure to give *any* address did not establish a Fourth Amendment violation, when the correct address was stated in the affidavit, and an officer familiar with the location executed the search. *Id.* at 866-867.

Under the commonsense approach that runs through those decisions of this Court and the courts of appeals, the Ninth Circuit was wrong in this case when it refused to look beyond the face of the warrant to determine whether there was a violation of the Warrant Clause. See Pet. App. 5a-6a.

3. The facts of this case illustrate the sound logic of the rule that errors and omissions in a warrant can be cured by information not specifically incorporated into, or attached to, the warrant. Although the warrant form that the magistrate judge signed was "facially defective," Pet. App. 6a, the warrant procedure followed by petitioner ensured that the purposes of the Warrant Clause were fully satisfied. The warrant was "meaningful and enforceable," *Vernonia Sch. Dist. 47J*, 515 U.S. at 670 (O'Connor, J., dissenting), despite petitioner's clerical mistake.

First, the warrant application and supporting affidavit provided the magistrate judge with the information neces-

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[4] This Court has required "the most scrupulous exactitude" in describing the items to be seized when the search directly implicates the First Amendment. *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); see *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565 (1978). However, that rule does not foreclose consideration of descriptions in the warrant application and supporting affidavit. Furthermore, the articulation of a "scrupulous exactitude" rule in that special context implies that the Warrant Clause's particularity requirements generally should be applied pragmatically.

sary to determine whether probable cause existed to search for the items specifically identified in the affidavit and application. See Pet. App. 28a-35a. Thus, "[t]he essential protection of the warrant requirement" was satisfied. *Gates*, 462 U.S. at 240.

Second, petitioner, in executing the warrant, was just as constrained by the magistrate judge's probable-cause determination as he would have been if the warrant form had been completed correctly. Petitioner's execution of the warrant could be challenged in court on the basis of the information given in the warrant application. Cf. *Dalia* v. *United States*, 441 U.S. 238, 258 (1979) (magistrate need not "set forth precisely the procedures to be followed by the executing officers," because "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness"). Likewise, the magistrate judge's probable-cause determination was fully reviewable based on petitioner's affidavit. See *Gates*, 462 U.S. at 239 ("In order to ensure that * * * an abdication of the magistrate's duty does not occur, courts [in suppression proceedings] must * * * conscientiously review the sufficiency of affidavits on which warrants are issued."); see also *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978) (discussing affidavit requirement).

The court of appeals was of the view that, in light of petitioner's failure to reference and attach the supporting affidavit, his clerical mistake: (i) "increased the likelihood and degree of confrontation between [respondents] and the police"; (ii) "deprived [respondents] of the means to be on the lookout and to challenge officers who might have exceeded the limits imposed by the magistrate"; and (iii) created factual questions about what was said during the search that "would broaden the area of dispute between the parties in subsequent litigation." Pet. App. 7a. The court of appeals was wrong on each point.

The Ninth Circuit's first two concerns—involving respondents' risk of confrontation with police and ability to monitor police conduct during the search—rest on the assumption that persons whose property is the subject of the search will become aware of defects in the warrant *during the search*. Otherwise, the defects could not affect those individuals' response to the executing officers.

Yet, contrary to the Ninth Circuit's view, see Pet. App. 8a n.4 (relying on *United States* v. *Gantt*, 194 F.3d 987, 1000-1005 (9th Cir. 1999)), there is no requirement that the executing officers must provide copies of their federal warrant to persons they encounter as they conduct a search. Federal Rule of Criminal Procedure 41, which "reflects" Fourth Amendment principles, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 558 (1978), provides only that, when executing officers seize property, they must leave a copy of the warrant and a receipt for the property being taken. Fed. R. Crim. P. 41(f)(3); see *Katz* v. *United States*, 389 U.S. 347, 355-356 n.16 (1967) ("Rule 41[] * * * does not invariably require [service of the warrant] before the search takes place."); *Frisby* v. *United States*, 79 F.3d 29, 32 (6th Cir. 1996) ("The Fourth Amendment does not necessarily require that government agents serve a warrant * * * prior to initiating a search or seizing property."); *Hulsey* v. *Texas*, 929 F.2d 168, 171-172 (5th Cir. 1991) ("[T]he fact that Hulsey did not see the warrant before the search does not invalidate the search."). Accordingly, in a case like this where no property is seized, a copy of the warrant need not be provided.

As a result, unless the executing officer voluntarily goes beyond Rule 41 and provides copies of the warrant before undertaking the search, technical defects in the warrant will be unknown, and therefore immaterial, to other persons on the scene during the search. As Judge Posner has explained, "[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed

until the search has ended, is further evidence that the requirement of a particular description does not protect an interest in monitoring searches." *Stefonek*, 179 F.3d at 1034.[5]

The Ninth Circuit also was mistaken insofar as it suggested that, absent the clerical error, the warrant would have provided respondents a definitive list of the items that could be seized. See Pet. App. 7a. When "the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character," they may seize the incriminating article under the "plain view" doctrine, notwithstanding that it was not listed in the warrant. *Coolidge*, 403 U.S. at 465 (plurality opinion); see *Horton* v. *California*, 496 U.S. 128 (1990). Therefore, individuals whose property is the subject of a search warrant do not have grounds to protest a seizure solely because the seized property was not specifically listed in the warrant.

The court of appeals' final concern—that technical defects in warrants will lead to disputes about what the officers did or did not say during the search, see Pet. App. 7a—is also unfounded. As the court of appeals itself recognized (*ibid.*), that concern would arise only if officers' oral statements could "expand the scope of the warrant" beyond what the magistrate authorized. But that issue does not appear to be implicated by the facts of this case. The issue here is whether precise descriptions of the property to be seized

[5] It might be argued that defects in the warrant create a risk of conflict *after* the search, if property is seized and a copy of the warrant therefore is provided. That concern seems attenuated on its face. Furthermore, such a concern could be addressed by a requirement that the executing officers timely provide information curing any defects that are brought to their attention. As noted, that was done in this case when petitioner "immediately" faxed the warrant application's description of the items to be seized. Pet. App. 21a.

that were submitted to the magistrate sufficiently remedied petitioner's good-faith mistake in completing the warrant form. What the officers said during the search need not be considered when determining whether the particularity requirements of the Warrant Clause are satisfied.[6]

Finding a Fourth Amendment violation based on a clerical mistake in the warrant, when the substantive policies of the Warrant Clause have been satisfied, would be contrary to the "strong preference for warrants" and the associated rule "that 'in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fail.'" *Leon*, 468 U.S. at 914 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 106 (1965)). Furthermore, from the perspective of law enforcement officers, excessively rigid applications of the Warrant Clause could lessen the benefit of obtaining a warrant, and might discourage officers from utilizing the warrant process when a warrantless search would be permissible.[7] Cf. *Ventresca*, 380 U.S. at 108 ("A grudging or negative attitude by [courts reviewing magistrates' probable cause determinations] will tend to discourage police officers from submitting their evidence to a

[6] Nevertheless, petitioner's statements to respondents, together with his prompt delivery of the application's list of items to be seized, does confirm the absence of any prejudice to respondents from petitioner's clerical error. Insofar as the record shows, petitioner addressed every concern about the scope of the warrant that arose during the search, as soon as it arose.

[7] For example, in a case involving the sort of highly dangerous weapons believed to be on respondents' ranch, an officer might reasonably believe that exigent circumstances exist. See, *e.g.*, *United States* v. *Al-Azzawy*, 784 F.2d 890, 895 (9th Cir. 1985) (finding exigent circumstances when police reasonably believed trailer contained explosives and they were unable to arrest all persons entitled to enter it), cert. denied, 476 U.S. 1144 (1986); *United States* v. *Herrera*, 711 F.2d 1546, 1556 (11th Cir. 1983) ("[E]xigent circumstances, if such were required, existed in the form of a vessel laden with arms and possibly explosives.").

judicial officer before acting."). The particularity provisions of the Clause do not compel that undesirable result. Rather, like the probable cause requirement, those provisions should be interpreted "in a commonsense and realistic fashion." *Ibid.*[8]

B. The Judicial Creation Of A *Bivens* Remedy Is Not Justified In This Context

Bivens recognized an implied damages action under the Fourth Amendment to redress the "unconstitutional invasion of [an individual's] rights by federal agents," 403 U.S. at 390, in a situation where it was apparent that "some form of damages [wa]s the only possible remedy" for the asserted injury, *id.* at 409 (Harlan, J., concurring in the judgment). See *id.* at 410 ("For people in Bivens' shoes, it is damages or nothing."). That remedial imperative does not exist in this case, because the alleged constitutional error resulted in no cognizable injury to respondents. More generally, technical defects in the particularity of a warrant's description of the items to be seized, which escape the magistrate's attention, are unlikely to lead to injuries in the general run of cases. Thus, even if petitioner's clerical mistake was not cured by the application and supporting affidavit, and the search was constitutionally defective, that error should not give rise to a damages action under *Bivens*.[9]

In *Bivens*, the Court acknowledged that neither a congressional enactment, nor the text of the Constitution, pro-

[8] Federal magistrate judges preside over approximately 30,000 warrant proceedings each year. See *Sourcebook of Criminal Justice Statistics 2001* <http://www.albany.edu/sourcebook/1995/pdf/t162.pdf>. Therefore, even a small disincentive to apply for a warrant may affect a significant number of cases in the aggregate.

[9] Although this argument was not separately raised below, it involves a pure question of law that is logically intertwined with the Fourth Amendment and qualified immunity questions presented by the petition.

vides for enforcement of the Fourth Amendment by an award of money damages. See 403 U.S. at 396-397. Nonetheless, the Court concluded that it has authority to recognize such a remedy. *Id.* at 392 ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.") (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). In the decade following *Bivens*, the Court similarly recognized implied damages remedies under the Due Process Clause of the Fifth Amendment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, see *Carlson* v. *Green*, 446 U.S. 14 (1980). More recent decisions, however, "have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *id.* at 68-70 (discussing cases).

A *Bivens* remedy likewise should not be inferred here. Any distress experienced by respondents as a result of the search was caused by the search itself, not the flaw in the form of the warrant. Because the execution of the search was unaffected by the alleged constitutional error, respondents suffered no cognizable injury as a result of that error. Therefore, even if respondents could establish a violation of the Fourth Amendment, they would not be entitled to recover compensatory damages. See *Carey* v. *Piphus*, 435 U.S. 247, 263 (1978) (under 42 U.S.C. 1983, damages recoverable for procedural due process violation limited to those resulting from deficient procedures themselves); see also *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307-308 (1986) ("Where no injury [i]s present, no 'compensatory' damages [can] be awarded.").

The Court stated in *Carey* that the denial of certain "absolute" constitutional rights "should be actionable [under Section 1983] for nominal damages without proof of actual

injury." 435 U.S. at 266. But the availability of nominal damages under that *statutory* cause of action does not suggest the same result under the judicially created *Bivens* remedy. As noted, this Court has resisted extending *Bivens* when its central purpose of "compensating victims" for constitutional wrongs, *Carlson*, 446 U.S. at 21, would not be advanced.[10] See, *e.g.*, *Malesko*, 534 U.S. at 72-73 (no *Bivens* cause of action where claimants had other effective remedies). It follows that the *Bivens* remedy should not reach a case such as this, in which the alleged constitutional violation did not have substantive consequences for respondents and respondents have not made any specific allegation that they suffered compensable injury arising directly from that supposed violation. See 3/4/99 Compl. paras. 45-49 (J.A. 26-27) (damages allegations); see also *Butz* v. *Economou*, 438 U.S. 478, 504 (1978) (*Bivens* established cause of action for "a citizen suffering a compensable injury to a constitutionally protected interest"); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (opinion of Kennedy, J.) (*Bivens* cases "reflect a sensitivity to varying contexts, and the courts should consider whether there are 'special factors counseling hesitation,' [*Bivens*,] 403 U.S., at 396, before allowing a suit to proceed").[11]

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[10] That hesitation has existed even when alternative statutory remedies—which, in this case, potentially include a trespass action against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)—"provide[] a less than complete remedy for the wrong." *Bush* v. *Lucas*, 462 U.S. 367, 373 (1983); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 427-428 (1988). But cf. *Carlson*, 446 U.S. at 19 (FTCA does not "pre-empt a *Bivens* remedy").

[11] In contrast to the facts of this case, Bivens alleged that he had been subjected to a search that was conducted without probable cause and that unreasonable force was used. 403 U.S. at 389. It would be consistent with this Court's cases for there to be an implied damages remedy under the Fourth Amendment in that context, but not in this context. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 484 n.9 (1994) ("[A] *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others.").

More generally, technical mistakes in listing the items to be seized, which escape the magistrate's attention, are unlikely to give rise to damages. There is no need to recognize a damages action to remedy technical violations that will rarely produce any relevant injury. While it may be necessary in the context of a statutory cause of action to allow suits involving little or no damages to proceed, there is no necessity to justify inferring a damages remedy for good-faith mistakes that will result in damages only rarely, if at all. Moreover, as this Court has recognized, allowing suits like this to proceed to trial imposes substantial costs on federal officers, even if the ultimate damages awards routinely are minimal. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985).

Although deterrence is the other purpose of the *Bivens* remedy, *Carlson*, 446 U.S. at 21, this Court has never extended the remedy when no compensatory purpose would be served. See *Carlson*, 446 U.S. at 16 n.1, 21; *Davis*, 442 U.S. at 231, 245; *Bivens*, 403 U.S. at 396-397. Furthermore, deterrent purposes also underlie the Fourth Amendment exclusionary rule. See, *e.g.*, *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995). As explained below, see pp. 26-29, *infra*, the exclusionary rule would *not* have required suppression, in a criminal trial, of evidence seized during the search in this case, precisely because penalizing objectively reasonable, good-faith conduct "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 919-921. Neither the exclusionary rule nor a *Bivens* remedy is effective at deterring good-faith mistakes. Moreover, the need for magistrate review and approval of warrants will deter any intentional efforts to deviate from the require-

ments of the Warrant Clause. The deterrence rationale therefore does not justify the recognition of a *Bivens* remedy in this case. As in the exclusionary-rule context, a "marginal or nonexistent [deterrent] benefit[]," *Leon*, 468 U.S. at 922, does not justify the judicial implication of such a remedy.

C. Petitioner Is Protected Against Suit And Liability Under The Law Of Qualified Immunity

If, contrary to the foregoing discussion, the allegations of respondents' complaint do establish a Fourth Amendment violation that is actionable under *Bivens*, petitioner is immune from suit and liability unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Stated differently, petitioner is entitled to the protection of qualified immunity unless no "reasonable officer could have believed" that the search of respondents' residence was lawful, "in light of clearly established law and the information [petitioner] possessed." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Under that standard, petitioner would be entitled to qualified immunity because, despite his mistake in filling in the warrant form, he reasonably could have believed that his execution of the search warrant issued by the magistrate judge did not violate the Constitution. See *Butz*, 438 U.S. at 507 ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.").

1. The Ninth Circuit decided the qualified immunity issue in this case by conceiving a new, bright-line rule: that, even when a lead officer personally prepares a warrant and the magistrate judge approves it, the officer nevertheless acts unreasonably unless he then takes further steps to "satisfy [himself] that * * * it is not defective in some obvious way." Pet. App. 8a; see *id.* at 10a. That rule—which imposes a sort of strict liability for technical defects that the court of appeals deems particularly obvious, see Pet. App. 10a—was not stated in *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997), which the Ninth Circuit said "controls" this case. Pet. App. 6a. As the Ninth Circuit acknowledged in a recent unpublished opinion, its decision in this case "built upon" *McGrew*. *United States* v. *Hightower*, 42 Fed. Appx. 65, 67 (2002). Furthermore, because the search in this case occurred in March 1997 and *McGrew* was decided six months later in September 1997, *McGrew* could not have established petitioner's obligations at the time of the search. Accordingly, petitioner did not act unreasonably solely for failing to abide by a rule that did not exist at the time of the search.

2. The court of appeals believed that its determination of a Fourth Amendment violation was based on clearly established law, because of the Ninth Circuit's rule that an affidavit must be both attached to the warrant and incorporated by reference, in order to supplement the text of the warrant. See Pet. App. 5a-6a. As already discussed, that rule has been rejected by most other circuits and its strict application is inconsistent in principle with numerous cases of this Court and the courts of appeals, including the Ninth Circuit, that have applied the particularity requirements of the Warrant Clause pragmatically, with regard to their purposes. See pp. 11-15, *supra*. In light of those inconsistent decisions, the Fourth Amendment law that confronted petitioner in 1997 cannot be said to have been clearly established. See *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); see also *Hanlon* v. *Berger*, 526 U.S. 808, 810 (1999) (officers entitled to qualified immunity even though Ninth Circuit had anticipated Court's

holding that media ride-alongs violate Fourth Amendment).[12]

3. Moreover, immunity would be appropriate even if the relevant Fourth Amendment law had been clearly established. This Court has emphasized the similarity of (i) the "objective reasonableness" inquiry that (along with the requirement of clearly established law) is part of the qualified-immunity test, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), and (ii) the "'objectively reasonable' conduct" test that is employed in deciding whether the good-faith exception to the Fourth Amendment exclusionary rule applies, *Leon*, 468 U.S. at 919-920. See *id.* at 922 n.23; *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986). On facts very much like these, the Court determined in *Sheppard* that the officers' actions were objectively reasonable and, under *Leon*, evidence should not be suppressed, even though the detective who applied for the warrant "knew" that the warrant form (which referenced controlled substances) "was defective," but took no steps to confirm that the magistrate corrected it. 468 U.S. at 989; see pp. 12-13, *supra* (discussing *Sheppard*). The Court emphasized that the officers reasonably "rel[ied] on the judge's assurances that the warrant authorized the search they had requested." 468 U.S. at 989 n.6. Moreover, and despite the obvious defect in the warrant form, the Court stated that *Sheppard* did not present facts under which "it [wa]s plainly evident that a magistrate or judge had no business issuing a warrant." *Id.* at 990 n.7 (citation and internal quotation marks omitted).

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[12] The application of the Warrant Clause to the facts of this case was particularly unclear because nothing was seized and, therefore, petitioner was not required to provide respondents with a copy of the warrant. See p. 17, *supra*. The Ninth Circuit, which imposed an (incorrect) warrant-service requirement in 1999, see *Gantt*, *supra*, had not established that rule in 1997.

The problem with the warrant here (a further description of respondents' residence, in lieu of a description of the items to be seized) is no more fundamental than the problem with the warrant in *Sheppard* (an entirely irrelevant description of items to be seized, see 468 U.S. at 986 n.2). And, just as the court of appeals found to be true in this case, the detective in *Sheppard* "would surely have realized" the problem if he had read the warrant before executing it. Pet. App. 10a. Nevertheless, this Court determined in *Sheppard* that "it was not unreasonable for the police * * * to rely on the judge's assurances that the warrant authorized the search they had requested." 468 U.S. at 989 n.6. For analogous reasons, petitioner's actions were objectively reasonable and petitioner should be entitled to qualified immunity.

The differences between *Sheppard* and this case do not support a different conclusion. In *Sheppard*, the judge rejected the draft warrant that the detective had presented for approval, but assured the detective, "by word and by action," that a valid warrant would issue. 468 U.S. at 986, 990. In this case, the magistrate judge did not reject the draft warrant, and he assured petitioner of the validity of the warrant by his action in signing the warrant, but without additional verbal confirmation. The differences are largely offsetting: Petitioner had less reason than the detective in *Sheppard* to doubt the constitutional sufficiency of the draft warrant, but also less assurance that the signed warrant was valid.

Furthermore, under *Leon*, a magistrate's approval and issuance of a warrant cannot be taken as conclusive proof of the warrant's validity in every situation. See 468 U.S. at 922-923. It therefore would be difficult to conclude that *Sheppard*, decided the same day as *Leon*, turned on the proposition that a magistrate's oral assurance can be deemed absolute proof of validity. But, by the same token, the Fourth Amendment's text appears to place on the magi-

strate the primary onus for ensuring that a warrant provides a sufficiently particular description of the items to be seized. Accordingly, except when "it is plainly evident that a magistrate or judge had no business issuing [any] warrant," *Sheppard*, 468 at 990 n.7 (citation and internal quotation marks omitted), courts should be hesitant to conclude that an officer acts objectively unreasonably when he or she conducts a search in good-faith reliance on a validly issued, but facially flawed, warrant.

When courts of appeals determine in the suppression context that an officer executed a constitutionally defective warrant, they routinely conclude that the officer nevertheless acted reasonably, and that the good-faith exception to the exclusionary rule applies.[13] The availability of the *Leon* exception in the suppression context reduces the need to consider the exact nature of the constitutional violation, and there is no occasion in that context to decide whether a *Bivens* action or qualified immunity would be available in a civil proceeding. Nevertheless, the effect of the Ninth Circuit's ruling here is to subject law-enforcement officers to personal liability in circumstances that, in most circuits, would not lead to the suppression of evidence under the exclusionary rule. The facts of this case, which reflect petitioner's good-faith adherence to warrant procedures and complete compliance with the limitations contained in the warrant application and supporting affidavit, do not suggest a justification for that incongruous result.

[13] See, *e.g.*, *Thomas*, 263 F.3d at 808-809 (warrant gave wrong address); *United States* v. *Cherna*, 184 F.3d 403, 411-413 (5th Cir. 1999) (affidavit specifically describing items to be seized not attached to warrant), cert. denied, 529 U.S. 1065 (2000); *United States* v. *Blakeney*, 942 F.2d 1001, 1025-1026 (6th Cir.) (affidavit describing items not incorporated by reference), cert. denied, 502 U.S. 1008 (1991); *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990) (same); *United States* v. *Curry*, 911 F.2d 72, 77-78 (8th Cir. 1990) (warrant omits address), cert. denied, 498 U.S. 1094 (1991); *United States* v. *Bonner*, 808 F.2d at 867 (same). Cf. *Stefonek*, 179 F.3d at 1034-1036 (evidence not suppressed when warrant failed to describe items to be seized, because search was conducted within scope of detailed application and affidavit).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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